Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CITY OF GREENWOOD VILLAGE, COLORADO,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Airline Deregulation Act's preemption of state laws relating to a "price, route, or service" of a properly certificated air carrier, while reserving to the airport proprietor its rights and powers, permits an airport proprietor to exclude certain categories of aviation services to conform to regional airport planning, existing airport facilities, the safe operation of the airport, and the civil aviation needs of the public.

2. Whether a local airport proprietor's ban on scheduled passenger service is a lawful exercise of the airport's proprietary rights and powers under the Airline Deregulation Act, when authorized by state law and where the prohibited use has never been allowed, when it is deemed necessary to meet the airport's role as a general aviation reliever airport within the regional and local aviation and land use plans, consistent with the existing facilities at the airport, and necessary for the safe operation of the airport.

PARTIES TO THE PROCEEDING

The following entities are parties in the court of appeals: The City of Greenwood Village; the Arapahoe County Public Airport Authority; and the Federal Aviation Administration.

RULE 29.6 STATEMENT

Petitioner Greenwood Village is a home-rule city and is not a corporation.

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PETITION FOR WRIT OF CERTIORARI

The City of Greenwood Village respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.[1] The Arapahoe County Public Airport Authority ("Authority") filed its own petition for writ of *certiorari* on August 2, 2001.

OPINIONS BELOW

The opinion of the court of appeals is reported at 242 F.3d 1213, and is reprinted in the Petitioner's Appendix ("App."). (App. 1a-22a). The FAA Director's Determination, Initial Decision, and Final Agency Decision and Order are publicly available at 1998 WL 1083382 (F.A.A.), 1999 WL 500027 (F.A.A.), and 1999 WL 499647 (F.A.A.), and are reprinted in the Appendix at (App. 106a, App. 60a, and App. 23a, respectively).

[1] The City of Greenwood Village is a home-rule city incorporated in 1950 pursuant to the Colorado Constitution, ART. 20, §1, and Colo. Rev. Stat. §31-1-201. Greenwood Village is located in Arapahoe County, Colorado, one of the four counties comprising the metropolitan area of Denver, Colorado. Greenwood Village is adjacent to Centennial Airport, whose operations directly affect the City's interests. Greenwood Village intervened in the Federal Aviation Administration ("FAA") proceeding and the petition for review before the Tenth Circuit Court of Appeals. C.A. Vol. VII.64 at 3-12; C.A. Vol. VII.69.

JURISDICTION

The court of appeals entered its judgment on March 9, 2001. The court of appeals denied a timely request for rehearing *en banc* and petition for panel rehearing on May 7, 2001. (App. 224a-225a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the federal aviation laws: Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1707 (1978), now codified at 49 U.S.C. §41713(b), states in pertinent part:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
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> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Section 502(b) of the Airport and Airway Improvement Act, Pub. L. No. 97-248, 96 Stat. 673, now codified at 49 U.S.C. §47101(g), requires the Secretary of Transportation to:

> . . . cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs. The airport plans and programs shall be developed in coordination with other transportation planning and considering comprehensive long-range land use plans and overall social, economic, environmental, system performance, and energy conservation objectives. The process of developing airport plans and programs shall be continuing, cooperative, and comprehensive to the degree appropriate to the complexity of the transportation problems.

Section 511(a)(1) of the Airport and Airway Improvement Act, now codified at 49 U.S.C. §47107(a)(1), provides that the Secretary of Transportation must receive written assurances that an "airport will be available for public use on reasonable conditions and without unjust discrimination." *See also* 14 C.F.R. Part 152, §152, Appdx. D, ¶18.

The Colorado Public Airport Authority Law, Colo. Rev. Stat. §41-3-106(1)(h), grants enumerated powers to the Authority, including the power to:

> . . . provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities; to perform any duties, necessary or consistent with the regulation of air traffic . . . and to exercise such powers as may be required or consistent with the promotion of aeronautics and the furtherance of commerce and navigation by air.

STATEMENT OF THE CASE

This case presents a direct conflict between the decision of the Tenth Circuit Court of Appeals and the Supreme Court of the State of Colorado regarding whether the Arapahoe County Public Airport Authority ("Authority") may exclude scheduled passenger service pursuant to its powers and rights as an airport proprietor or whether such regulation is preempted by the Airline Deregulation Act ("ADA"). This case involves the important question regarding the scope of federal preemption under the Airline Deregulation Act ("ADA"), 49 U.S.C. §41713(b)(1), and the exception for the rights and powers of an airport proprietor exercising state authority. 49 U.S.C. §41713(b)(3). The ADA does not define proprietor powers and this Court has never ruled on the precise scope. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973). The resulting extensive and contradictory litigation between the Federal Aviation Administration ("FAA") and airports or between airports and local communities regarding what powers are preempted and what are not demonstrates that there is a compelling need for this Court to grant review.

The Colorado Supreme Court has ruled that the Authority has the power to ban scheduled passenger service on the grounds that it would interfere with the safe operation of the airport and the civil aviation needs of the public. (App. 195a). The Tenth Circuit disagreed and ruled that the FAA was correct in concluding that the Authority does not have that power. (App. 19a-21a). At issue is whether the FAA or the Authority can decide that the airport must add scheduled passenger service, even if

that would change the essential character of the airport as a general aviation-reliever facility.[2]

A. Summary of Proceedings

For almost seven years, the Authority has defended in state and federal courts its power to exclude scheduled passenger service based on the classification of the airport as a general aviation-reliever facility in the Denver regional aviation system plan, the limitations of the existing airport facilities, and the Authority's determination that Centennial Airport should not become a full-service commercial airport, in part because it could not provide for passenger safety in the event of a crash or fire. When Centennial Express Airlines ("Centennial Express") first sought to begin scheduled passenger service, the Authority adopted a moratorium on its review of applications and sought direction from the FAA.[3] (App. 177a). When Centennial Express began scheduled passenger service at Centennial Airport without any operating approval, the

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[2] A general aviation airport "means an airport that is not a commercial service airport." 49 U.S.C. §47134(m). A commercial service airport "means a public airport in a State that the Secretary determines has at least 2500 passengers boarding a year and is receiving scheduled passenger service." *Id.* §47102(7). A reliever airport is intended "to relieve congestion at a commercial service airport and to provide more general aviation access to the overall community." *Id.* §47102(18).

[3] Centennial Express was originally incorporated as Centennial Express Airlines, Inc. but its operations were under the corporate name of Golden Eagle Charters, Inc. d/b/a Centennial Express Airways. C.A. Vol. IX.86. The companies were owned by the same individual and will be referred to as Centennial Express.

Authority secured an injunction barring Centennial Express from flying. (App. 181a). Centennial Express successfully appealed to the state court of appeals arguing that scheduled passenger service was governed by federal law which preempted any state or local rule and that FAA had primary jurisdiction. (App. 181a). The Colorado Supreme Court reversed, finding that federal law did not preempt the Authority's proprietary powers and that the Authority correctly exercised such powers in this case. (App. 188a-189a).

When the Colorado Supreme Court issued its decision in April, 1998, the FAA had not taken any action on the pending discrimination complaints filed by a Centennial Express shareholder in August, 1994 and by Centennial Express in January, 1995, or intervened in the state court proceedings. On August 21, 1998, the FAA declared that the Authority was ineligible for federal grants on the basis that it had violated federal law and the terms of its grant assurances not to unjustly discriminate among rates, route or class of service. (App. 29a.) The Authority appealed the FAA Director's Determination and Greenwood Village intervened in the administrative proceedings under 14 C.F.R. §16.207(b). (App. 29a). After a hearing and initial appeal, the FAA Administrator affirmed on the same grounds and for the same reasons as stated in the Director's Determination. (App. 41a-58a).

The Authority sought review in the Tenth Circuit and Greenwood Village joined as an intervenor. (App. 1a, 6a). In affirming the FAA's order, the Tenth Circuit rejected the earlier decision of the Colorado Supreme Court, which upheld the Authority's ban. (App. 13a-22a).

B. Factual Background

1. Centennial Airport

Centennial Airport was built in 1967 to serve the growing general aviation needs of the Denver metropolitan region and to relieve Stapleton International Airport of its general aviation traffic. (App. 174a-175a). Newspaper accounts of open meetings confirm that in 1966 the Arapahoe County approved funding for the construction of Centennial Airport in order to "serve general aviation, not scheduled carriers or military planes." (App. 175a-176a). At the time, the FAA area director explained that Centennial was a "much needed reliever terminal for general aviation."[4] (App. 176a).

Arapahoe County established the Authority in 1975 pursuant to the Colorado Public Airport Authority Law ("CPAAL"), Colo. Rev. Stat. §§41-3-101 to 41-3-108 (1997), to own and operate Centennial as a political subdivision of the State. (App. 175a). The Authority owns all of the land and facilities at Centennial except for two runways which it leases from Arapahoe County. (App. 175a).

Since 1983, the Authority has received $18.5 million in federal grants from the FAA to fund airport land purchases, construction and rehabilitation of runways, taxiways, navigation aids, buildings, and even signs, (App. 64a-65a). Funds granted to general aviation-

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[4] In addition to the statutory definitions, the FAA classifies airports in terms of their respective transportation roles, including commercial passenger service, cargo-transport, transport-reliever, general aviation, and military for funding purposes. C.A. Vol. IX.82.

reliever airports are discretionary and are administered under the Airport Improvement Program ("AIP") established by the Airport and Airway Improvement Act of 1982 (the "AAIA"), 49 U.S.C. §§47101-47113. In exchange for these grants, the Authority has given its assurance that "it will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses," as required by the AAIA, 49 U.S.C. §47107(a)(1). FAA regulations allow the Authority to "limit any given type, kind, or class of aeronautical use of the airport, if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." 14 C.F.R. Part 152, §152, Appdx. D, ¶18.

Local, regional, and national airport plans all designate Centennial Airport as a reliever airport for Denver International Airport ("DIA"), which replaced Stapleton International in 1995, and not as a commercial passenger airport. (App. 175a-176a). The Denver Regional Council of Governments ("DRCOG"), a planning organization of 50 county and municipal governments in the Denver metropolitan area, designates Centennial as a "non-commercial passenger, transport-category, general aviation reliever airport." (App. 73a-74a; 176a). The National Plan of Integrated Airport Systems ("NPIAS"), and the 1991 and 1999 Secretary of Transportation congressional reports also list Centennial Airport as a reliever airport intended to alleviate general aviation congestion at Denver's primary commercial airport, not as a commercial service airport. DIA is the only commercial service

airport which has scheduled passenger service in the Denver metropolitan area. (App. 176a-177a).

Centennial Airport is one of several hundred general aviation reliever airports in the United States and most general aviation-reliever airports do not have commercial passenger service.[5] Due to its planned role as a general aviation reliever airport and based on the strong opposition from citizens who live near the airport, including the residents of Greenwood Village, scheduled passenger operations have never been permitted at Centennial Airport; the airport also lacks a terminal, baggage facilities, a passenger security system, and fire on emergency medical facilities to deal with passenger plane accidents. (App. 177a).

2. Proposed Scheduled Service

Beginning in 1985, Centennial Express contacted the Authority about starting scheduled passenger service at Centennial Airport. (App. 24a). On April 8, 1993, the Authority imposed a moratorium on the review of applications for scheduled passenger service while the issue of whether the Authority may prohibit such operations was resolved. (App. 3a-4a, 26a). One month later, undaunted by the moratorium, Centennial Express filed an application with the Authority to conduct scheduled passenger service at Centennial. Centennial Express' application

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[5] The 1996 National Plan of Integrated Systems ("NPIAS") report indicates that there are 285 reliever airports. C.A. Vol. XIX(21)(r). The 1999 NPIAS report states that there are 334 reliever airports.

proposed to operate 30-seat aircraft directly to eight cities with up to six flights a day to each city.[6] (App. 69a-70a). Centennial Express' proposed operation, assuming a sixty-percent load factor, would have resulted in approximately 630,000 passengers a year at Centennial and 36,000 additional flight operations a year. (App. 67a); C.A. Vol. X-XIII Tr. pp. 325-330.

In July, 1993, the Authority sent a letter to the United States Department of Transportation ("DOT") requesting policy guidance on the issue, and arguing that federal airport grant obligations should not be construed to require Centennial Airport to accept scheduled passenger service. (App. 126a, 177a). The Authority pointed to the original, and continued, purpose of the airport as a reliever to Denver's passenger airport, the lack of on-the-ground facilities to safely support passenger operations, and the impacts of scheduled passenger service would have on the airport's capacity. (App. 177a-178a).

Before DOT responded, but more than one year after the Authority had requested guidance, on September 8, 1994, the Authority adopted a policy barring scheduled passenger service at Centennial Airport. (App. 4a, 68a-69a, 177a). The policy explains the need to preserve the airport's funding category as a "Reliever Airport"

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[6] 14 C.F.R. §139.1 limits scheduled passenger service at uncertificated airports, such as Centennial Airport, to aircraft with less than 31 seats. In 1996, after several commuter air carrier accidents, Congress amended the aviation laws to prohibit scheduled passenger service at uncertificated airports, except for service in aircraft with less than 10 passenger seats. 49 U.S.C. §44706(b). FAA did not issue rules under this subsection until Congress required it in 2000.

serving general aviation, and provides in part, "[u]nder no circumstances shall the Airport Purpose include scheduled passenger service." The Authority also adopted minimum standards, which state that scheduled passenger service is inconsistent with the "Airport Purpose and will not be allowed to operate at the airport unless required by final court order." (App. 68a-69a).

The policy and standards reflected the Authority's conclusions that scheduled operations would create ground congestion at the Airport, would require substantial construction and investment in Centennial's infrastructure, including parking, passenger terminal, and baggage handling facilities, and would exceed the airport's capacity. (App. 191a, 194a). Centennial Airport has a maximum operational capacity of 525,000 annual operations, and in 1994, its annual operations were about 402,325.[7] Centennial Express' proposed scheduled services would have added at least 36,000 operations and 630,000 passengers, and the resulting mix of small, low-speed private aircraft and large, high-speed commercial planes would have created unsafe conditions. (App. 67a, 79a); C.A. Vol. X-XIII.91 Tr. pp. 325-330. The Authority also recognized that Centennial Airport does not have on-site Air Rescue and Fire team to deal with a passenger plane crash. (App. 75a).[8] Centennial Airport's role as a

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[7] C.A. Vol. XVII(14). By 1998, Centennial Airport's operations increased significantly. In only the first seven months of 1998, Centennial Airport reported 275,000 operations. (App. 71a).

[8] Centennial Airport is served by the South Metro (formerly Castlewood) Fire District. The station house near the airport also serves several thousand homes and businesses and

general aviation reliever airport and the above considerations prompted the Authority to conclude that the exclusion of scheduled passenger service was necessary for the safe operation of the airport and necessary to serve the civil aviation needs of the public. (App. 49a-52a).

The DOT did not respond to the Authority's request for guidance until 17 months later, a few days after Centennial Express began its short-lived passenger operation. The DOT letter stated that it was arbitrary to exclude a particular class of service due to factors not reasonably related to the impacts of the service, and that the Authority had not provided sufficient information to support such a restriction. (App. 178a-179a).

C. State Court Proceedings

1. Two days after Centennial Express' unauthorized maiden flight, the Authority obtained a temporary restraining order in Colorado state court prohibiting Centennial Express from conducting scheduled passenger service operations at Centennial Airport. A permanent injunction was entered against the airline on January 10,

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a fire truck would require at least six minutes to reach the runway in event of a crash or fire. C.A. Vol. VIII.80; C.A. Vol. XV.3(c). This situation does not meet the National Transportation Board's ("NTSB") recommended three-minute response time for fire safety, and, therefore, the chance of survivable crash victims was zero. (App. 75a). While the NTSB report came out in 1996, it confirmed the concerns voiced by the Castlewood Fire Chief that passenger deaths were unavoidable in the event of a fire or crash. (App. 75a).

1995. (App. 4a, 178a, 181a). Centennial Express successfully appealed the injunction to the Colorado Court of Appeals, but a plurality of the Colorado Supreme Court reversed and reinstated the permanent injunction on April 13, 1998. (App. at 174a).

2. In the state court, Centennial Express argued that the FAA had primary jurisdiction and that the ADA preempted the Authority's ban on scheduled passenger service. The Colorado Supreme Court held that the ban was not preempted, relying on this Court's direction in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) ("*Travelers*"), that a court should first presume "that Congress does not intend to supplant state law," *id.* at 654, and then review the objectives of the statute to define "the scope of the state law that Congress understood would survive." *Id.* at 656. In applying this analysis, the Colorado Supreme Court found that the purpose of the ADA preemption clause was to prevent inconsistent or conflicting state regulations from interfering with the national air travel system and ruled that the Authority's ban on scheduled passenger service concerns only an area of local and regional planning, and thus, was not within the intended scope of the congressional preemption. (App. 188a-189a).

The Colorado Supreme Court also held that the Authority's ban fell squarely within the proprietor's exception to preemption under the ADA, 49 U.S.C. §41713(b)(3), which does not prohibit a political subdivision from "carrying out its proprietary powers and rights." (App. 191a). The court reasoned that the CPAAL, C.R.S. §41-3-106(1)(h), clearly gave the Authority the

power to define and limit the scope of permissible operations at Centennial Airport. The court held that the ban on scheduled passenger service was reasonable, because, *inter alia*, the prohibited use had never been previously allowed. (App. 191a-192a).

Lastly, the court held that the Authority was in compliance with its federal grant assurance to make the airport available on "fair and reasonable terms and without unjust discrimination." (App. 192a-195a). The court agreed with the Authority's concerns over the safe operation of the airport, increased congestion, and insufficient airport facilities. (App. 194a). The court also emphasized the importance of Centennial's status as a general aviation-reliever airport, and agreed that the imposition of scheduled service would result in increased commercial operations and force general aviation operators out of the airport. The court also concluded that the Authority was not unjustly discriminating against a particular operator because the ban on scheduled passenger service applied to all airport users equally. (App. 194a-195a).

D. FAA Proceedings

FAA received two complaints alleging discrimination and violation of Centennial Airport's grant assurances, from Thomas Kehmeier, a shareholder of Centennial Express in August, 1994, and Centennial Express in January, 1995, respectively. (App. 27a). After FAA adopted 14 C.F.R. Part 16, which established simpler complaint procedures for enforcement proceedings against federally funded airports, Centennial Express filed a second complaint under this Part 16 in 1998. (App. 27a). The FAA

consolidated the previous complaints and their administrative records into a single Part 16 proceeding. (App. 27a).

Notwithstanding the existence of administrative complaints against Centennial Airport since 1994 and FAA's knowledge of the permanent injunction order, the FAA took no action until after the Colorado Supreme Court announced its decision in April, 1998. On August 21, 1998, the Director of FAA's Office of Airport Safety and Standards issued a determination, finding that: (1) the FAA was not bound by the Colorado Supreme Court's decision, because FAA was not a party; (2) the Authority's ban was contrary to the prohibition on state and local regulations relating to a price, route or service of an air carrier, 49 U.S.C. §41713(b)(1); and (3) the Authority violated the terms of the grant assurance regarding economic nondiscrimination, as provided for in 49 U.S.C. §47107(a)(1), as well as the grant assurance regarding exclusive rights, as set forth in 49 U.S.C. §§47107(a)(4) and 40103(e). (App. 139a-161a). The Authority requested a formal evidentiary hearing in September, 1998. (App. 29a). Greenwood Village intervened as a party under 14 C.F.R. §16.207(b), over FAA's objections. (App. 29a). The hearing officer issued his initial decision on December 23, 1998, and affirmed the Director's determination on all findings of fact and law. (App. 83a-105a).

The Hearing Officer and later the FAA Administrator rejected the Authority's determination of adverse safety, efficiency, and environmental effects from scheduled service on the assumption there was no difference between charter or air taxi and private non-scheduled operations

and scheduled passenger service using the same or similar aircraft. (App. 93a-95a). The FAA concluded that there was no evidence that increased operations would result in safety problems, especially since the Authority had not banned non-scheduled air taxi or private jet service using the same type of aircraft. Initial Decision (App. 94a). FAA also summarily dismissed the Authority's and Greenwood Village's concerns with increased air and ground traffic and congestion as speculative. (App. 94a). Nor was the lack of passenger facilities like a public terminal, baggage handling and security, sufficient to justify the ban, since on-demand air taxi operations had been providing services without those facilities. (App. 94a-95a).

E. The Tenth Circuit's Decision

The Authority petitioned the Tenth Circuit for review of the FAA's final agency order. As a party to the proceeding below, Greenwood Village filed a notice of intervention pursuant to Tenth Circuit Local Rule 15.1. The jurisdiction of the Tenth Circuit as the court of first instance was invoked under 49 U.S.C. §§46110 and 47106(d)(3).

In denying the Authority's petition for review and affirming the FAA's order, the Tenth Circuit held that "the strong policy of federal supremacy in the field of aviation prevails over full faith and credit principles in this case." (App.14a). The Tenth Circuit bluntly stated that the Colorado Supreme Court decision "has no bearing on the FAA decision before us." (App. 14a-15a). In direct conflict with the Colorado Supreme Court's decision, the Tenth Circuit "easily" concluded that the ADA, 49 U.S.C. §41713(b)(1),

expressly preempted the Authority's ban on scheduled passenger service because it related to a "service" and "route" of an air carrier. The court relied on precedent in *Morales v. Trans-World Airlines, Inc.*, 504 U.S. 374, 384 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995), concluding that the ADA preempts all state enforcement actions having a connection with or reference to airline rates, routes, or services. (App. 16a-17a).

With regard to the ADA's proprietor exception, 49 U.S.C. §41713(b)(3), and in stark contrast with the decision of the Colorado Supreme Court, the Tenth Circuit took the position that local proprietors play an extremely limited role in the regulation of aviation. (App. 18a). The court then concluded that a proprietor can only issue reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest. (App. 18a-19a).

The Tenth Circuit also concluded that the administrative record did not support the Authority's claim that the ban on scheduled service was necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public, notwithstanding the Colorado Supreme Court decision to the contrary. (App. 20a-21a). In applying a "substantial evidence" standard of review, the court upheld the FAA's finding that the Authority unreasonably exercised its proprietary powers in banning scheduled passenger service, and held that the Authority exceeded the legitimate scope of power as an airport proprietor under 49 U.S.C. §41713(b) and the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and therefore, the ban was preempted by federal law. (App. 21a).

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review on the Important Question of the ADA's Preemption Provision and the Scope of an Airport Proprietor's Powers In Light of the Diametrically Opposite Decisions of the Tenth Circuit and the Colorado Supreme Court

1. The Tenth Circuit's ruling is in fundamental disagreement with the decision of the Colorado Supreme Court over the breadth of express or implied preemption under the ADA and the permissible scope of an airport proprietor's powers and rights. This conflict is well suited for resolution as the underlying facts arise from the same events and legal controversy and resolution turns on the legal questions of whether the ADA preempts the airport proprietor's authority and whether the Authority's scheduled passenger service ban is unjust discrimination.

The ADA preemption clause provides that no state or political subdivision may "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. §41713(b)(1). The ADA qualifies this preemption by stating: "This subsection does not limit a State, political subdivision of a State, or political authority . . . that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." 49 U.S.C. §41713(b)(3). Colorado law grants the Authority broad powers to regulate the use of airport

land and facilities, as well as air traffic. C.R.S. §41-3-106(h).

2. The Colorado Supreme Court began its analysis of the preemption issue with this Court's decision in *Morales*, which held, relying on an earlier interpretation of similar language in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1144(a), that "state enforcement actions having a connection with or reference to airline rates, routes and services" were preempted by the ADA. (App. 186a-188a citing *Morales*, 504 U.S. at 384). In ruling that the Authority's ban was not preempted, however, the Colorado Supreme Court turned to the more recent *Travelers* decision in which this Court explained that it may have interpreted the "relating to" language in prior ERISA cases, too broadly and that ERISA's preemption provision should be applied in a more limited fashion.

The Colorado Supreme Court applied the *Travelers* decision to analyze the preemption question "with the starting presumption that Congress does not intend to supplant state law," 514 U.S. at 654, and to examine the statutory objectives as a guide to determine "the scope of the state law that Congress understood would survive." *Id.* at 656. The Colorado Supreme Court found that the ADA preemption clause reflected Congress' concern that individual states would pass inconsistent and conflicting laws regulating the airline industry. (App. 188a-189a). The court then held that the Authority's ban did not undermine the purpose of the ADA because it concerned an area of local and regional planning which would not lead to inconsistent or conflicting state regulation. (App. 188a-189a). It only applied to Centennial's regional role

as a general aviation reliever for DIA, Denver's primary commercial airport. (App. 188a-189a).

3. In contrast, the Tenth Circuit's preemption analysis begins and ends with *Morales* and *American Airlines v. Wolens*, and does not use the analysis required under the *Travelers* decision. (App. 16a-17a). Thus, the Tenth Circuit did not recognize the presumption against preemption established in *Travelers*, and failed to consider whether the Authority's ban contradicted the ADA's objectives and purposes. Instead, the Tenth Circuit summarily concluded that the Authority's ban is connected with and relates to both services and routes and, thus, was preempted. (App. 17a).

4. The Tenth Circuit and the Colorado Supreme Court also fundamentally disagree on the permissible scope of an airport proprietor's rights and powers. The Colorado Supreme Court held that the Authority's ban on scheduled passenger service did not relate to "a price, route, or service of an air carrier" under 49 U.S.C. §41713(b)(1), because it did not concern typical service-oriented tasks, such as ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling. (App. 189a). Similarly, the court concluded, the Authority was not regulating fares or routes because the ban on scheduled service did not "delineate what airlines can charge or where they can fly." (App. 189a).

The Tenth Circuit disagreed, holding that a prohibition on all commercial passenger service was a regulation of routes. The Tenth Circuit held that the Authority affirmatively curtailed an air carrier's business decision to offer a particular service in a particular market (*i.e.*,

route), and that the ban also "significantly impacts the scope of services available to public citizens desiring to travel by air from Centennial Airport." (App. 17a). Ironically, both courts cite to the same case, *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995), in reaching opposite conclusions. (App. 17a, 189a, respectively). These different outcomes only underscore the significant confusion and inconsistent interpretations on this question.

5. This case also raises the legal question of the meaning and scope of the term "service" in the ADA. Three justices would have granted certiorari in *Duncan v. Northwest Airlines, Inc.*, 208 F.3d 1112 (9th Cir. 2000), *cert. denied sub nom. Northwest Airlines v. Duncan*, 121 S.Ct. 650, ___ U.S. ___ (2000), because the Courts of Appeals are divided on the meaning of the term "service" in 49 U.S.C. §41713(b)(1), and this is an important issue, which has broad ramifications. *Id.*

II. This Court Should Grant Review To Resolve The Inconsistency Between Two 1995 Decisions of This Court: *American Airlines v. Wolens* and *Travelers*

1. In *American Airlines v. Wolens*, this Court applied the *Morales* decision to hold that the ADA preempted consumer litigation against the airline in state court on fraud, because the plaintiffs' claims related to " 'rates', *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' *i.e.*, access to flights and class-of-service upgrades" charged by the defendant airline. *American Airlines, Inc. v. Wolens*, 513 U.S. at 223, citing *Morales*, 504 U.S. at 378-379. Several

months later, this Court in *Travelers* held that the previous decisions went too far in finding preemption based on the "relating to" language and adopted a different analysis, which recognized a presumption against preemption. *Travelers*, 514 U.S. at 656. This Court in *Travelers* further held that preemption issues must be analyzed by determining whether the state law contradicted the congressional objectives in enacting the preemption provision. *Id.* The *Travelers* decision did not directly discuss the *American Airlines v. Wolens* or *Morales* decisions but narrowed the analysis used in *Morales*, upon which the decision rested.

2. The different approaches taken by the Tenth Circuit and the Colorado Supreme Court in attempting to define the scope of preemption under the ADA clearly illustrate the potential contradiction between *American Airlines v. Wolens* and *Travelers*, when construing ADA preemption. In holding that the Authority's ban on scheduled passenger service was not preempted by the ADA, the Colorado Supreme Court began its analysis with the broad test under *Morales* but then turned directly to *Travelers'* more narrow approach based on an examination of Congress' purpose in enacting the ADA preemption provision. (App. 186a-188a). The Colorado Supreme Court found that Congress adopted the ADA preemption clause out of concern over the potential for conflicting state laws attempting to regulate the airline business. (App. 185a). It then wrote: "Because the regulation concerns an area of local and regional planning, it will not lead to inconsistent or conflicting state regulations. Therefore, the regulation does not undermine the purpose of the ADA preemption provision." (App.

188a-189a). The Colorado Supreme Court did not discuss the *American Airlines v. Wolens* decision in its opinion.

The Tenth Circuit, on the other hand, found that the ADA preempted the Authority's ban on scheduled passenger service flights. (App. 16a-17a). In its opinion, the Tenth Circuit applied the broad *Morales* test in the ADA context, citing *American Airlines v. Wolens*. The Tenth Circuit wrote: "The Supreme Court has interpreted this provision broadly to preempt all 'State enforcement actions having a connection with or reference to airline "rates, routes, or services." ' . . . We easily conclude the Authority's ban is connected with and relates to both services and routes. By banning scheduled passenger service, the Authority has affirmatively curtailed an air carrier's business decision to offer a particular service in a particular market. The ban also significantly impacts the scope of services available to public citizens desiring to travel by air from Centennial Airport." (App. 16a-17a). The Tenth Circuit does not discuss the *Travelers* decision in its opinion.

Thus, the Tenth Circuit and the Colorado Supreme Court reached separate, contradictory and diametrically opposed decisions employing the standards set by this Court. Given the importance of the ADA and preemption issues generally, the Court needs to resolve this question.

3. The Tenth Circuit could not have found preemption had it followed the analytical process required under *Travelers*. 514 U.S. at 655. While Congress intended the ADA's preemption provision to ensure that States would not undo federal deregulation by adopting their own regulations, 49 U.S.C. §41713(b)(1); *Morales*, 504 U.S. at 378, the ADA "does not limit" a state or local government

from "carrying out its proprietary powers and rights." 49 U.S.C. §41713(b)(3). Congress did not intend "to limit in any way the normal exercise of a proprietor's powers to determine the level and nature of service to be provided at airports, subject to constitutional and statutory limitations . . . " 124 CONG. REC. 38,526 (1978) (statement of Cong. Anderson). *See also Midway Airlines, Inc. v. County of Westchester, N.Y.*, 584 F. Supp. 436, 440 n.18 (S.D. N.Y 1984), quoting 124 CONG. REC. 37,419 (1978) (remarks of Sen. Kennedy) ("The legislative history is unmistakably clear" that Congress did not intend to "interfere with 'long recognized powers of the airport operators to deal with noise and other environmental problems at the local level' ").

Congress also intended to preserve proprietary powers as they existed before the enactment of the ADA. A Senate Report, for example, states that the preemption provision "should not be construed to affect or limit existing proprietary rights of airport operators to manage, operate, or regulate airports." *Air Transportation Ass'n of America v. Crotti*, 389 F. Supp. 58, 64 (N.D. Cal. 1975), citing S. Rep. No. 95-631, 95th CONG., 2nd SESS. 39, 99 (1978). In this context, a pre-ADA case explains that "such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities." *Id.*

III. This Court Needs to Clarify the Scope of An Airport Proprietor's Powers Given the Contradictory Decisions of the State and Federal Courts

There is a compelling need for this Court to more precisely define the scope of the airport proprietor's exception to preemption under the ADA to resolve the conflict in the case law, to guide the FAA and regional and local authorities when planning for and operating the nation's airports.

1. This is an important question, which should be resolved by this Court. None of the preemption cases, *Morales, American Airlines v. Wolens,* or *Travelers* concerned the scope of an airport proprietor's rights and powers under the ADA. This Court has never defined the scope of the airport proprietor's exception, *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. at 635-36 n.14. ("We do not consider here what limits, if any, apply to a municipality as a proprietor"). When Congress adopted the ADA in 1978, it did not define the proprietor's rights and powers. The lack of a clear definition has led to widely disparate decisions by the federal and state courts.

2. This case illustrates the conflict. The Colorado Supreme Court's held:

> [We] believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception. While regulations concerning aircraft noise and ground congestion restrict the manner in which airport users conduct their operations, a ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of

> permissible operations at the airport. *The power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed. . . .*

(App. 191a-192a) (emphasis added).

The Colorado Supreme Court looked to the delegation of an airport authority's powers as delineated by state law in holding that the Authority has the power to define and limit the scope of permissible operations at Centennial Airport. (App. 192a). Under the CPAAL, the Authority is empowered to "provide rules and regulations governing the use of such airport and facilities," to "perform any duties, necessary or consistent with the regulation of air traffic," and to "exercise such powers as may be required or consistent with the promotion of aeronautics and the furtherance of commerce and navigation by air." C.R.S. §41-3-106(1)(h). In contrast, the Tenth Circuit "recognized that local proprietors play an extremely limited role in the regulation of aviation," (App. 18a quoting *American Airlines, Inc. v. Dept. of Transp.*, 202 F.3d 788, 806 (5th Cir.), *cert. denied*, 530 U.S. 1274 (2000)).

3. Nor is this an isolated issue. State and federal courts reach very different conclusions when reviewing the exercise of an airport's proprietary powers under 49 U.S.C. §41713(b)(3). While the Tenth Circuit held that the Authority could not ban scheduled passenger service, other courts have held that an airport can deny year-long operating authority, *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986), or allow only one

carrier to serve the airport, *Sea Air Shuttle Corp. v. Virgin Islands Port Authority*, 800 F. Supp. 293, 304 (D. V.I. 1992).

The Tenth Circuit rejected the Authority's rationale that scheduled passenger service contradicted Centennial Airport's general aviation-reliever role in regional and local plans and that the lack of on-the-ground facilities for passengers made such service unsafe or unsuited to Centennial Airport. However, several other courts recognize that these functions which roughly correlate to "on-the-ground" facilities and activities, such as fire and rescue, land use, environmental permits, and airport facilities, like hangars, parking lots, and taxiways, are uniquely those of the airport proprietor. *Midway Airlines, Inc. v. County of Westchester*, 584 F. Supp. at 440 n.18 (airport proprietor has a legitimate need to ensure the safety of passengers while on the ground).

While the Tenth Circuit also rejected the Authority's decision that Centennial Airport's capacity, traffic and congestion, and ground facilities made scheduled passenger service inappropriate, other courts have upheld similar exclusions. For example, LaGuardia Airport's perimeter rule, which prohibited airlines from using the airport for nonstop flights beyond a set distance, is valid. *Western Airlines, Inc. v. Port Auth. of N.Y. & N.J.*, 658 F. Supp. 952, 956-57 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied sub nom. Delta Airlines, Inc. v. Port Auth. of N.Y. & N.J.*, 485 U.S. 1006 (1988). The stated purpose of the rule was to reduce ground congestion and to maintain LaGuardia as a short and medium haul airport (its role in New York's regional plan) by diverting longer haul air traffic to other airports. *Id.* at 953. In upholding the rule as a valid exercise of an airport's

proprietary powers, the court noted that the scope of proprietary powers often arose in the context of noise regulations, but that the ADA "does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind." *Id.* at 957. The court added, "A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise." *Id. See also Air Transport Ass'n of America v. City and County of San Francisco,* 992 F. Supp. 1149, 1188 (N.D. Cal. 1998).

Some courts take a contrary view, reflecting FAA's narrow viewpoint of a proprietor's powers. *City and County of San Francisco v. FAA,* 942 F.2d 1391, 1394-1397 (9th Cir. 1991), *cert. denied,* 503 U.S. 983 (1992) (airport could not exclude certain types of air cargo jets); *New England Legal Found. v. Massachusetts Port Auth.,* 883 F. 2d 157, 170 (1st Cir. 1989) (setting aside landing fees as discriminatory); and *British Airways Bd. v. Port Auth. of N.Y. & N.J.,* 564 F.2d 1002, 1011 (2d Cir. 1977) (proprietary powers very limited). However, other decisions show that an airport proprietor has broad authority over land use planning at the airport, law enforcement, approval of tenants and leases, and fire fighting. *See, e.g., City of Burbank v. Burbank Glendale-Pasadena Airport Auth.,* 85 Cal. Rptr.2d 28, 36 (Cal. Ct. App. 1999); *State by Minnesota Public Lobby v. Metropolitan Airports,* 520 N.W.2d 388, 392 (Minn. 1994) (distinguishing between noise rules adopted by the state versus those by the airport proprietor); *Gustafson v. City of Lake Angelus,* 76 F.3d 778, 786-87 (6th Cir. 1996).

Even the FAA can be inconsistent. In *Aircraft Owners and Pilots Ass'n v. Hinson*, 102 F.3d 1421, 1425 (7th Cir. 1996), the FAA withdrew its opposition to Chicago's decision to close Meigs Field and decided not to compel the city to operate the airport pursuant to its grant agreement.

4. Whether the proprietor's exception allows a local airport proprietor to regulate the scope of permissible operations based on regional planning objectives is a fundamentally important issue that directly affects the 334 general aviation reliever airports listed in the NPIAS. FAA approves and funds regional and national aviation plans which assign specific transportation roles to the public airports within a given community or region. The Denver regional plan limits commercial passenger service to DIA and classifies all regional airports, including Centennial Airport, as reliever airports. This is typical of aviation plans throughout the country where other general aviation airports are assigned reliever-non-passenger roles. If FAA can unilaterally require an airport to change its role without regard to the regional and local aviation transportation plans (which ironically are funded and approved by FAA), then the airport proprietor who participates in and relies on the plan has lost powers clearly provided to it under federal and state law.

The implications also extend far beyond local airport proprietors and their users. Communities like the City of Greenwood Village, which surround or are near these airports, rely on regional transportation decisions and the allocation of air service in making comprehensive planning and zoning decisions which include the location of residential development and the construction of schools.

These communities need certainty regarding both the location and purpose of transportation facilities and need to be able to rely on those decisions in making their own governmental decisions.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 6, 2000.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, a political subdivision of the State of Colorado, Petitioner, v. FEDERAL AVIATION ADMINISTRATION, Respondent, CITY OF GREENWOOD VILLAGE, Intervenor. --- REGIONAL AIRLINE ASSOCIATION, Amicus Curiae.	No. 99-9508

Appeal from the Federal Aviation Administration

(Filed March 9, 2001)

Brian A. Magoon (Ronald S. Loser with him on the briefs) of Brega & Winters, P.C., Denver, Colorado, for Petitioner.

Christine N. Kohl (David W. Ogden, Acting Assistant Attorney General, and Michael Jay Singer, Department of

Justice, with her on the brief), Department of Justice, Washington, DC, for Respondent.

Constance E. Brooks (Michael B. Marinovich and Christine A. Longhitano with her on the briefs) of C.E. Brooks & Associates, P.C., Denver, Colorado, for Intervenor.

Before **BRORBY** and **McWILLIAMS,** Circuit Judges, and **ELLISON,* District Judge.**

BRORBY, Circuit Judge.

This case involves the Federal Aviation Administration's (FAA) decision to suspend petitioner's eligibility for discretionary federal grants, based on claimed violations of federal statutes and existing grant provisions. Petitioner Arapahoe County Public Airport Authority (Authority) and Intervenor City of Greenwood Village (City) urge us to set aside the decision for various reasons, not the least of which is the decision is incompatible with an earlier opinion issued by the Colorado Supreme Court. We exercise jurisdiction pursuant to 49 U.S.C. §§ 46110 and 47106(d)(3). For the reasons set forth below, we deny the Petition for Review and affirm the FAA's order.

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* The Honorable James O. Ellison, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

BACKGROUND[1]

The Authority owns and operates Centennial Airport, which is located just south of Denver, Colorado. Operations at the airport historically have consisted of "unscheduled" commercial passenger and cargo service. In the course of operating the airport, the Authority has accepted millions of dollars in discretionary grants from the FAA. As part of the grant process, the Authority made assurances the airport would be "available . . . for public use on reasonable terms and without unjust discrimination, to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport." However, within the same grant assurance, the FAA also recognized the Authority "may prohibit or limit any given type, kind or class of aeronautical use . . . if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Over the course of several years, Centennial Express Airlines (Centennial Express) divulged an interest in providing scheduled passenger service at Centennial Airport, culminating in an official application in May 1993. Centennial Express submitted its application despite the Authority's actions one month earlier placing a moratorium on the consideration of applications for scheduled passenger service. The moratorium was designed to

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[1] The Authority states in its brief the only issues on appeal are legal in nature. Therefore, the facts presented in the background section of this opinion draw extensively from the FAA's decision.

provide the Authority time to determine whether it could legally prohibit scheduled service. While the Authority asked for guidance from the FAA on the question, it ultimately decided to completely ban all scheduled air carrier service without waiting to hear from the FAA.[2] In contravention of the Authority's ban, Centennial Express initiated scheduled passenger service between Centennial Airport and Dalhart, Texas on December 20, 1994. The Authority immediately sought and obtained a temporary injunction in state district court to prevent Centennial Express from offering scheduled passenger service.

The state district court eventually granted the Authority a permanent injunction. Centennial Express successfully appealed the injunction to the Colorado Court of Appeals, but a plurality of the Colorado Supreme Court reversed the state court of appeals and reinstated the permanent injunction. *See Arapahoe County Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) (en banc). The Colorado Supreme Court issued its opinion despite concurrent complaints on file with the FAA, and in so doing decided federal law

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[2] The Authority wrote the FAA in July 1993, and adopted the ban in September 1994. The FAA responded in December 1994. The FAA response was not favorable to the ban, stating: "In addressing similar cases in the past, [the] FAA has found it arbitrary to exclude any particular class of service due to factors that are not reasonably related to the impacts of that service." The FAA also found the Authority submitted insufficient information "to demonstrate that a restriction of any particular category of operation could be adequately supported," and concluded "existing policy on airport access must be complied with."

did not preempt the Authority's ban on scheduled passenger service and the ban did not violate the terms of the non-discrimination grant assurances. *See id.* at 592-97. The FAA was not a party to this state litigation.

As alluded to in the previous paragraph, the agency decision-making process under review here got its start at the same time as the state litigation, and involves the same basic facts. Thomas Kehmeier, a Centennial Express stockholder, filed the first complaint with the FAA in August 1994, claiming the Authority's ban violated federal law and the grant assurances. Centennial Express filed its own complaint in January 1995. As the Colorado Supreme Court noted, the FAA had yet to rule on either complaint in 1998 when the court issued its opinion. *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 592. These initial complaints were filed pursuant to 14 C.F.R. Part 13. New rules, found at 14 C.F.R. Part 16, and entitled "Rules of Practice for Federally-Assisted Airport Enforcement Proceedings," went into effect December 16, 1996. Centennial Express filed a second complaint under the new part 16 rules on February 23, 1998, just two months prior to the Colorado Supreme Court's decision. Centennial Express filed the second complaint even though the company had voluntarily surrendered its FAA operating certificate in January 1996.

After consolidating the three complaints, and despite the then-existing Colorado Supreme Court decision to the contrary, FAA's Director of the Office of Airport Safety and Standards issued an initial determination on August

21, 1998, concluding the ban violated the grant assurances and federal law. The Authority requested a hearing,[3] which was held over two days in November 1998, and resulted in an affirmance of the director's initial decision. The Authority and the City subsequently appealed the hearing officer's decision to the FAA Associate Administrator for Airports, who issued the FAA's Final Agency Decision and Order affirming the previous decisions. The Authority then filed the current petition for review, and the City filed a Notice of Intervention pursuant to 10th Circuit Rule 15.2(A).[4]

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[3] The hearing officer granted the City's motion to intervene; therefore, the City also participated in the hearing.

[4] The FAA argues the City is without statutory authority to intervene in this review. We assume for purposes of this opinion, but do not decide, that the City's intervention is proper. However, as an intervening party, the City may join issue only on matters brought before the court by the Authority as petitioner. *See Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues")). We acknowledge this limitation is a prudential determination as opposed to a mandate of rule or statute, *see Synovus Fin. Corp. v. Board of Governors*, 952 F.2d 426, 433-34 (D.C. Cir. 1991); nonetheless, we agree it should be avoided only in "extraordinary cases." *New York v. Reilly*, 969 F.2d 1147, 1154 n.11 (D.C. Cir. 1992). This is not an extraordinary case. The City's issues, as a whole, are directed toward the complainants' standing, alleged due process deficiencies, mootness and laches. Although the City summarily characterizes these issues as related to "prudential jurisdictional deficiencies," after careful examination we conclude the City's issues are not "essential predicates" or substantively connected to the issues the Authority presented in its brief and Petition for Review. *See United States Tel. Ass'n v.*

STANDARD OF REVIEW

Our review of the FAA's final decision and order suspending the Authority's eligibility for discretionary federal grants is governed by the Administrative Procedure Act, 5 U.S.C. § 706.[5] Within this context, we review matters of law de novo. *See Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000). However, the FAA's findings of fact are conclusive if supported by substantial evidence. *See id;* 49 U.S.C. § 46110(c). The substantial-evidence standard does not allow us to displace the FAA's "choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Babbitt*, 199 F.3d at 1231 (quotation marks and citation omitted); *see also Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1102 (10th Cir. 1999) (same).

FCC, 188 F.3d 521, 530-31 (D.C. Cir. 1999). Moreover, the City presents no reason why it could not have petitioned for review in its own right. *See id.* at 531. We therefore decline to consider issues raised by the City but not the Authority.

[5] A reviewing court may set aside an agency determination pursuant to 5 U.S.C. § 706(2) if it is (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; (e) unsupported by substantial evidence; or (f) unwarranted by the facts to the extent they are subject to de novo review. 5 U.S.C. § 706(2); *see Lewis v. Babbitt*, 998 F.2d 880, 881-82 (10th Cir. 1993).

ANALYSIS

The Authority contends the final FAA decision and order should be set aside for the following three "errors of law:" (1) the Colorado Supreme Court opinion reinstating the permanent injunction against Centennial Express "is final, preclusive and dispositive;" (2) the Authority and not the FAA determines whether scheduled passenger service will be prohibited as necessary for the safe operation of the airport and to serve the public's civil aviation needs; and (3) any allowable scheduled passenger service must be limited to aircraft designed for nine or fewer passenger seats.[6] We address each alleged error in turn.

The Colorado Supreme Court Decision

The Authority argues, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, that *Arapahoe County Public Airport Authority v. Centennial Express Airlines,* 956 P.2d 587, "is final, preclusive and dispositive" of the issues resolved in the FAA's final order. The Full Faith and Credit Act provides that the "judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as

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[6] The City, as Intervenor, joins in this third issue, contending "FAA acted outside or abused its authority when it prosecuted [the Authority] for banning scheduled passenger service after Congress amended the federal aviation laws to prohibit scheduled passenger service of more than 10 seats at uncertified airports and to further provide that no airport can be compelled to secure a certificate."

they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738.

The FAA asserts 28 U.S.C. § 1738 is not technically implicated here because it is an agency rather than a court, *see American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 799 (5th Cir.), *cert. denied*, 120 S.Ct. 2762 (2000); however, "[b]ecause most agency decisions may be reviewed in federal courts, and those courts must follow section 1738, [the FAA] therefore assume[s] that a common law rule of preclusion, like that embodied in section 1738, governs federal agency proceedings." We agree with the FAA and the Fifth Circuit that the preclusive effect, if any, of the Colorado Supreme Court decision derives from the common law doctrines of res judicata and issue preclusion (collateral estoppel), not § 1738. *See id.* at 799-800 & n.6. We further agree these common law doctrines extending full faith and credit to state court determinations are trumped by the Supremacy Clause if the effect of the state court judgment or decree is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy. *See id.* at 800; *see also Midgett v. United States*, 603 F.2d 835, 845 (Ct.Cl. 1979). Balancing, de novo,[7] the common law justification

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[7] *See American Airlines*, 202 F.3d at 799 (declining to defer to agency's ruling on full faith and credit issue); *see also Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (acknowledging a reviewing court need not afford deference to agency interpretation of statute or law it is not charged with administering); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) (same).

for full faith and credit with the competing policy supporting the Supremacy Clause, we conclude the FAA is not required to give preclusive effect to the Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines.*

We begin our analysis on the full faith and credit side of the equation. A close look at the Colorado Supreme Court decision reveals the primary issue before that court was the propriety of a permanent injunction enjoining Centennial Express from conducting scheduled air carrier service in and out of Centennial Airport. As such, the Colorado Supreme Court focused from the outset on Centennial Express' conduct in contravention of state regulations. *Arapahoe County Pub. Airport Auth.*, 956 P.2d at 593, 596 (stating that to defer to federal agency jurisdiction would be to "allow future airport users to unilaterally conduct and continue operations in violation of airport rules so long as they implicate federal jurisdiction in some way"). To the extent the Colorado Supreme Court addressed federal preemption issues and the Authority's obligations under the federal grant assurances, it did so in the narrow context of rejecting Centennial Express' defenses. *Id.* at 593-97. Further examination reveals that the court's conclusion the Authority did not violate the terms of the federal grant assurances lacks the depth and breadth of analysis given to those same issues by the Director of the FAA's Office of Airport Safety and Standards, the Hearing Officer, and ultimately, the Final Agency Decision and Order issued by the Associate Administrator for Airports. *Id.* at 596-97.

The credit to be given to the state court opinion is further influenced by the fact the Colorado Supreme

Court was seriously divided in this case, as evidenced by its plurality opinion – three of seven justices participated in the majority, one justice concurred, two justices dissented, and one justice abstained. *Id.* at 597. Of particular note here, Justice Scott, while concurring in the result, considered it "inappropriate" to address preemption in light of the fact the FAA had not yet acted under its authority. *Id.* at 597-98 (Scott, J. concurring). He justified the Colorado Supreme Court's holding based on its inherent authority to "issue an injunction to preserve the status quo pending resolution of the dispute in an appropriate forum." *Id.* at 599. Given Justice Scott's position, and the additional fact the two dissenting justices concluded that "in keeping with the doctrine of primary jurisdiction" the FAA is the appropriate forum to determine issues pertaining to preemption and grant compliance under federal statute, *id.* at 599 (Bender, J. and Martinez, J. dissenting), only half the participating court (three of six) ostensibly precluded the FAA from issuing a contrary ruling.

Last, but certainly not least, the FAA was not a party to, nor in privity with a party to, the state court proceedings. The FAA's interest in fulfilling its statutory responsibility to ensure airport compliance with federal aviation laws and grant assurances, and to protect the public interest, is obviously independent of the interests of any particular air carrier (*e.g.*, Centennial). Mere knowledge of the state court proceedings did not oblige the FAA to participate in those proceedings. *See Martin v. Wilks*, 490 U.S. 755, 762-65 (1989). Without the FAA as a party, the Colorado Supreme Court decision does not satisfy a fundamental requirement of issue preclusion under federal

or Colorado law. *See, e.g., Baker v. General Motors Corp.*, 522 U.S. 222, 237 n.11 (1998) ("In no event . . . can issue preclusion be invoked against one who did not participate in the prior adjudication."); *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10th Cir. 1994) ("collateral estoppel fails here simply because [plaintiff] was not a party to the first suit"); *O'Neill v. Simpson*, 958 P.2d 1121, 1123 n.5 (Colo. 1998) (en banc) ("party against whom estoppel is asserted [must have] been a party to or . . . in privity with a party in the prior proceeding"). This, together with the other circumstances discussed above, weighs heavily against extending full faith and credit to *Arapahoe County Public Airport Authority v. Centennial Express Airlines.*[8] *See,*

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[8] The Authority's reliance on *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), is misplaced. In *Deerfield*, the FCC was not a party in the state or federal court proceedings initiated by Mr. Joseph Carino to challenge municipal zoning regulations prohibiting the installation of a satellite dish in his backyard. Because the FCC did not want to become "a national zoning board," it required complainants like Mr. Carino to pursue other legal remedies before filing administrative complaints. *Id.* at 423. Only after the federal district court gave preclusive effect to the state court ruling in favor of the town, did the FCC "review" the federal district court's decision and issue an order, which, contrary to the federal district court, ruled that FCC regulations preempted the town's zoning regulation. *Id.* at 426. The Second Circuit Court of Appeals held the FCC impermissibly rendered the federal Article III court's decision a mere advisory opinion. *Id.* at 428-30.

The complexion of this case obviously is very different from *Deerfield*. In *Deerfield*, the FCC acted as a disinterested adjudicator to resolve a zoning dispute between two outside parties; the FCC never disputed state or federal jurisdiction over Mr. Carino's lawsuits. In this case, the FAA became an interested party in the administrative proceedings to determine

e.g., Acacia Villa v. United States, 24 Cl. Ct. 445, 448 (1991) (acknowledging the doctrine of issue preclusion is "based on a court's exercise of its equitable powers," and "is not mandated in the Constitution or by statute"); *United States v. Kaytso*, 868 F.2d 1020, 1022 (9th Cir. 1989) (stating "[e]ven when the elements of collateral estoppel are present, the decision whether to apply the doctrine is within the [court's] discretion"); *Western Group Nurseries, Inc. v. Pomeranz*, 867 P.2d 12, 15 (Colo. Ct. App. 1993) (ruling collateral estoppel is an equitable doctrine applied at the court's discretion).

Turning to supremacy principles, we reiterate that the issue before the FAA was whether the Authority complied with the conditions imposed on it by federal law and agreement with a federal administrative agency, in return for the Authority's receipt of federal funds. This federal scheme regulating airport grant compliance is "designed in part to insure the maintenance of conditions essential to an efficient national air transport system, including access to airports on a reasonable and non-discriminatory basis." *City & County of San Francisco v. FAA*, 942 F.2d 1391, 1395 (9th Cir. 1991), *cert. denied*, 503 U.S. 983 (1992). On this point, we must agree with the Fifth Circuit that in the arena of aviation regulation "federal concerns are preeminent," and the Department of

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the Authority's compliance with the grant assurances, and never deferred its right to determine compliance issues in the first instance. Moreover, although the FAA issued its decision after the Colorado Supreme Court ruled on the propriety of the permanent injunction against Centennial Express, the agency's decision in no way purported to "review, alter, or prevent enforcement of the judgment of an Article III court." *Id.* at 430.

Transportation, through the FAA, is statutorily mandated to represent those concerns. *American Airlines, Inc.*, 202 F.3d at 800-01. Indeed, it is "difficult to visualize a more comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172-73 (1st Cir. 1989) (discussing the FAA's primary role in administering and ensuring compliance with grant assurances) (quotation marks and citation omitted). This certainly tilts the balance toward the application of supremacy principles to protect against state courts trumping the federal interests and concerns embodied within the airport grant program.

As to the potential impact of the Colorado Supreme Court's ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* on federal regulation of the airport grant program, we perceive a direct and significant conflict inasmuch as this and similar state court rulings, if deemed preclusive, would frustrate the FAA's ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances. *See* 49 U.S.C. § 47122. If given preclusive effect, state court rulings favoring local airport authorities in actions tangentially involving federal grant assurances would further lead to inconsistent enforcement of the federally mandated assurances, potentially jeopardizing the efficiency and equality of access to our Nation's air transportation system. For these reasons, we hold the strong policy of federal supremacy in the field of aviation prevails over full faith and credit principles in this case. The Colorado Supreme Court's decision

in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* therefore has no bearing on the FAA decision before us.

Determinations based on Safety and Other Civil Aviation Needs

The Authority argues that as the proprietor of Centennial Airport responsible for local and regional aviation planning, it, and not the FAA, determines whether scheduled passenger service will be prohibited at the Airport as necessary for the safe operation of the airport and to serve the civil aviation needs of the public. In support of this argument, the Authority relies largely on the Colorado Supreme Court's conclusion the ban on scheduled passenger service was, indeed, necessary for the safe operation of Centennial Airport and to serve the public's civil aviation needs. As discussed above, that state court conclusion has no bearing on our decision.

Aside from its reliance on the state court decision, the Authority attempts to retry its case here by convincing us it has good reasons for imposing the ban (including, but not necessarily limited to, the design of and lack of facilities at Centennial Airport; local and regional planning objectives; and the recommendations incorporated in the National Transportation Safety Board's Commuter Airline Safety Study). Our job, however, is not that of fact-finder. We are called on here to review the decision of a federal administrative agency, and we will adhere to the appropriate standards governing such review, as previously articulated in this opinion. *See* 49 U.S.C. § 46110(c); *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1231.

We begin by addressing what we consider the threshold legal issue – whether the Authority is preempted by federal statute from imposing such a ban. The Airline Deregulation Act of 1978 expressly provides that a political subdivision of a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). The Supreme Court has interpreted this provision broadly to preempt all "State enforcement actions having a connection with or reference to airline 'rates, routes, or services.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (interpreting 49 U.S.C. § 1305(a)(1), the substantively identical, pre-1994 version of the Airline Deregulation Act preemption provision); *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 & n.1 (1995). The preemption provision does not, however, prevent a state or political subdivision of a state from carrying out its "proprietary powers," 49 U.S.C. § 41713(b)(3), so long as the exercise of proprietary powers is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed not to conflict with the Airline Deregulation Act and its policies. *See* 14 C.F.R. § 399.110(f). The validity of the Authority's ban therefore depends on (1) whether the Authority's ban "is related to a price, route, or service of an air carrier" implicated by 49 U.S.C. § 41713(b)(1); (2) if so, whether the Authority's ban amounts to an exercise of its propriety powers; and (3) if it is an exercise of proprietary powers, whether such exercise is reasonable, nondiscriminatory, nonburdensome and not in conflict with the Airline Deregulation Act, and thus exempted from preemption by 49 U.S.C. § 41713(b)(3).

We easily conclude the Authority's ban is connected with and relates to both services and routes. *See Morales*, 504 U.S. at 384. By banning scheduled passenger service, the Authority has affirmatively curtailed an air carrier's business decision to offer a particular service in a particular market. The ban also significantly impacts the scope of services available to public citizens desiring to travel by air from Centennial Airport. We reject any contention that "service" as used in 49 U.S.C. § 41713(b)(1) is not intended to include transportation itself, considering the Airline Deregulation Act's objective to enhance "the availability of a variety of adequate, economic, efficient, and low-priced services," 49 U.S.C. § 40101(4), and to "encourag[e] entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." 49 U.S.C. § 40101(13); *see also Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) ("Elements of the air carrier service . . . include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.").

The effect of such a ban further extends to route determinations because the carrier cannot conduct regular operations over any route involving the banned airport. We agree with the FAA that a prohibition on operating over any route is no less a regulation of routes than a restriction on the number of routes a carrier can operate from an airport.

Having determined the Authority's ban on scheduled passenger service constitutes a state regulation of air carrier service and routes, the ban is permissible only if it

constitutes an exercise of the Authority's propriety power. Although the Authority largely evades a direct discussion of the preemption issue in its briefs to this court, it suggests the scheduled passenger service ban is *per se* an exercise of its propriety power, because Grant Assurance 22i (patterned after Standard Assurance 22i, *see* 62 Fed. Reg. 29761, 29766 (1997)) permits the Authority to "prohibit or limit any given type, kind or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Thus, because the Authority determined "the ban was necessary for the safe operation of Centennial [Airport] and to serve the civil aviation needs of the public," it argues the proprietary powers exception to the statutory preemption provision applies.

"The precise scope of an airport owner's proprietary powers has not been clearly articulated by any court." *American Airlines, Inc.*, 202 F.3d at 806. Courts have, however, "recognized that local proprietors play an extremely limited role in the regulation of aviation." *Id.* (quotation marks and citation omitted). This acknowledgment alone undermines the Authority's apparent assertion that so long as they declare their regulatory action necessary for safety or to satisfy aviation needs, they enjoy carte blanche power. For purposes of this review, however, we will assume, without deciding, that regulatory conduct related to safety and civil aviation needs may fall under the "proprietary powers" umbrella, because under any circumstances, grant assurance language notwithstanding, "[i]n defining the permissible scope of a proprietor's power to regulate under § 14713(b)(3) . . . an airport

proprietor can issue only 'reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest.' " *Id.* (quoting *Western Air Lines v. Port Auth. of New York & New Jersey*, 658 F.Supp. 952, 958 (S.D.N.Y. 1986)). We therefore proceed to the third and final preemption inquiry.

At this point, we focus on whether the Authority's proclaimed "safety" and "civil aviation needs" justification is reasonable or nonarbitrary. We agree with the FAA this determination is a factual one for which the Authority, as the party asserting the justification, bears the burden of proving before the agency. *See* 14 C.F.R. § 16.229(c). Because of the fact-based nature of this inquiry, we must defer to the FAA's findings (1) the Authority failed to demonstrate the ban is necessary for the safe operation of the airport, and (2) the Authority failed to demonstrate the ban is necessary to satisfy the public's civil aviation needs, so long as those findings are supported by substantial evidence in the record.[9] 49 U.S.C. § 46110(c); *Wyoming Farm Bureau Fed'n*, 199 F.3d at 1231. We conclude they are.

Our careful review of the administrative record confirms a dearth of evidence to support the Authority's claim that the ban on scheduled service is necessary due

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[9] Although the Authority did not directly challenge the reasonableness of the FAA's findings on economic discrimination and exclusive rights, having carefully reviewed the administrative record, we conclude those findings are supported by substantial evidence, and therefore deem them conclusive.

to ground congestion, operational safety and environmental impact concerns. As noted by the FAA hearing officer, the testimony of individuals representing both the Authority and the City was largely speculative. The Authority and City submitted no quantitative analysis of the probable impacts of scheduled passenger airline service at Centennial airport. Conversely, the testimony of Mr. Barry Molar, Manager of FAA's Office of Airport Compliance, and other FAA representatives effectively rebutted the Authority's and City's evidence,[10] demonstrating that the Authority's concerns pertain to impacts that are "largely a function of the total number of operations at the airport," and are not particularized to scheduled passenger service. In other words, the record

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[10] For example, the Authority relies heavily on a general National Transportation Safety Board (NTSB) recommendation, derived from a Commuter Airline Safety Study (and Quincy Aircraft Accident Report), that scheduled passenger service be permitted only at airports certified pursuant to 14 C.F.R. Part 139. According to the Authority, it is not certified under Part 139 and has no intent to become certified. Moreover, the Authority claims it must rely on off-the-airport and non-exclusive fire protection services, which cannot respond to an airport emergency within three minutes. The Authority further claims it does not have the financial resources to provide exclusive, on-the-airport fire and rescue services.

In rebuttal, the FAA put into evidence proof the NTSB recommendation is a nonbinding recommendation which neither the Authority nor the FAA must follow, and Centennial Airport is not subject to a three-minute fire response time requirement. The FAA also elicited testimony the fire safety concern is no different for scheduled passenger service than it is for unscheduled, charter passenger service. Finally, the FAA demonstrated the Authority imposed the ban on scheduled passenger service prior to publication of the NTSB report.

substantiates the FAA's ruling that "[i]nasmuch as the Authority permits unscheduled passenger services using similar airplanes, flight patterns, making the same amount or more of noise, and does not limit the number of operations at the airport," the Authority fails to demonstrate how the ban on scheduled passenger service will alleviate the safety concerns and civil aviation needs the Authority and the City raise.

Because the record supports the FAA's findings that the Authority unreasonably exercised its proprietary powers to ban scheduled passenger service at Centennial Airport, we hold the Authority has exceeded its legitimate scope of power as a state or local government under 49 U.S.C. § 41731(b) and the Supremacy Clause of the United States Constitution. *See* U.S. Const. art. VI, cl. 2. The Authority's ban therefore is preempted by federal law.

Limitations on Scheduled Passenger Service

The Authority and the City assert that even if the ban on scheduled passenger service is unlawful, we should require the FAA to rule that passenger operations at Centennial Airport must be limited to nine-passenger aircraft in light of 1996 legislative amendments requiring airports to have a Part 139 certificate for scheduled passenger operations involving aircraft of more than nine passenger seats. *See* 49 U.S.C. § 44706(a)(2). Centennial Airport does not have such a certificate. Furthermore, the statute provides that the FAA cannot force the Authority to obtain a certificate. *See id.* at § 44706(f).

The FAA concluded it was unnecessary to resolve this issue because (1) the amended statute had not taken effect; and (2) the ban on scheduled passenger service at issue is total, providing no exception for aircraft with nine or fewer passenger seats, as evidenced by the fact the Authority sought and obtained an injunction against Centennial Express's *six*-passenger aircraft. We likewise decline to resolve this issue as it is not presented by the facts in this case. The Authority does not dispute that its ban on passenger service, as considered by the FAA, is indeed a total ban; nor does the Authority claim it has a pending request to provide service which would justify further consideration of the amended statute.

CONCLUSION

Because we hold (1) the Colorado Supreme Court's decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines* is not final, preclusive or dispositive of the issues resolved in the FAA's final order; (2) the Authority's ban on scheduled passenger service is preempted by statute and the Supremacy Clause; and (3) the present facts do not warrant prospective consideration of how 49 U.S.C. § 44706, as amended in 1996, might apply, we **DENY** the Authority's Petition for Review and **AFFIRM** the FAA's final Order.

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

CENTENNIAL EXPRESS AIRLINES, GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES	FAA Order No. 1999-1 (Part 16, Subpart G)
	Date:
	Docket Nos. 16-98-05, 13-94-03
v.	
ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	
THOMAS KEHMEIER	Docket No. 13-94-25
v.	
ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	
	No Separate Docket Number[1]
FEDERAL AVIATION ADMINISTRATION	
v.	
ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	

FINAL AGENCY DECISION AND ORDER

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[1] Under 14 C.F.R. § 16.203(b)(1), the agency became a party when the Director of the FAA Office of Airport Safety and Standards issued his determination providing the Airport Authority the right to a hearing.

I. Introduction

The question at the heart of this appeal is the lawfulness of a Federally-assisted airport operator's ban on all scheduled passenger service. At stake is the airport operator's eligibility for additional Federal grants.

II. Background

Arapahoe County Public Airport Authority (the Airport Authority) owns and operates Centennial Airport, which is outside of Denver, Colorado. Over the years, the Airport Authority has received millions of dollars in airport improvement grants from the Federal Aviation Administration (FAA). In exchange for the funds, the Airport Authority signed a grant assurance promising not to grant any person or persons exclusive rights, and another promising to make the airport "available for public use on reasonable conditions and without unjust discrimination." Under the latter assurance, however, the airport operator may "prohibit or limit any given type, kind, or class of aeronautical use . . . if such action [is] necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Beginning in 1985, Centennial Express contacted the Airport Authority about starting scheduled 14 C.F.R. Part 135 passenger service at Centennial Airport. On February 20, 1989, the Airport Authority published the following statement in its newsletter:

> . . . [C]ommercial service has always existed at Centennial in the form of Part 135 charter/air

> taxi certification, which permits "for hire" passenger and freight service, whether *scheduled* or unscheduled *Such activity may not be prohibited* but is limited to aircraft with 30 seats or less.

(Director's Determination at 12; emphasis added.) On October 3, 1989, the Airport Authority's newsletter contained the following statement:

> No scheduled air carrier, either large or small, has applied to the Authority to operate at the airport. Should any apply, the Authority will consider only the smaller, regional air service applications. No action will be taken by the Authority to consider such applications, however, without extensive community input and public hearing.

Id.

On December 12, 1991, Centennial Express sent the Airport Authority a letter asking the Airport Authority to set standards that would allow Centennial Express to operate scheduled passenger service. Centennial Express alleges that the Airport Authority notified Centennial Express that it was revising its airport policy statement and needed to complete the revision before it would enact minimum standards for scheduled passenger service under Part 135.

On March 12, 1992, the Airport Authority adopted a policy statement that stated as follows:

> The Authority reaffirms the original intent of the airport to service the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal

> Aviation Regulations Part 135/Operations Specifications 135 (30 or fewer seats). Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the application minimum standards.

(Director's Determination at 13.)

On April 8, 1993, the Airport Authority imposed a moratorium on considering applications for scheduled passenger service. Nevertheless, on May 7, 1993, Centennial Express Airlines (Centennial Express) – having acquired Golden Eagle Charters and its operating certificate, aircraft, and organization – applied to the Airport Authority to conduct scheduled passenger service at Centennial Airport. The Airport Authority did not approve Centennial Express's application. On September 8, 1994, the Airport Authority issued a policy statement banning scheduled passenger service at Centennial Airport.

On December 20, 1994, Centennial Express initiated scheduled passenger service between Centennial Airport and Dalhart, Texas with one six-passenger Beechcraft aircraft.[2] At the time, Centennial Express possessed both Federal safety and Federal economic authority to conduct scheduled passenger service operations at Centennial Airport. Two days later, the Airport Authority obtained a temporary restraining order from the District Court, County of Arapahoe, State of Colorado, prohibiting Centennial Express from providing scheduled service at Centennial Airport. On December 23, 1994, the U.S. Department of Transportation sent the Airport Authority an opinion letter stating that it was arbitrary to exclude a

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[2] FAA Exhibit 1, Item 6.

particular class of service for factors not reasonably related to the impacts of that service. On January 10, 1995, the Airport Authority obtained a permanent injunction from the same court. In January 1995, Centennial Express voluntarily surrendered its Part 135 operating certificate to the FAA.

On August 7, 1994, Thomas Kehmeier, a shareholder of Centennial Express, filed a formal complaint with the FAA, in Docket No. 13-94-25, as a private citizen, alleging that the Airport Authority violated Federal law and its grant assurances by imposing a moratorium on considering applications for scheduled passenger service at Centennial Airport. On January 30, 1995, Centennial Express also filed a formal complaint with the FAA, in Docket No. 13-95-03, alleging that the Airport Authority had improperly prohibited scheduled passenger service at Centennial Airport. Both complaints were filed under 14 C.F.R. Part 13, entitled "FAA Investigative and Enforcement Procedures." 14 C.F.R. Part 13, Subpart D. After the Rules of Practice for Federally-Assisted Airport Proceedings contained in 14 C.F.R. Part 16 went into effect,[3] Centennial Express filed a second complaint under Part 16 on February 23, 1998 (Docket No. 16-98-05). Centennial Express's Part 16 complaint contained the same allegations as its Part 13 complaint. The FAA consolidated the Part 13 dockets and their administrative records into the Part 16 proceeding to avoid duplicative proceedings and to assure that the agency met the Part 16 time requirements for the Part 16 complaint.

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[3] The Rules of Practice contained in Part 16 went into effect on December 16, 1996. 61 Fed. Reg. 53,998 (October 16, 1996).

Meanwhile, Centennial Express was appealing the permanent injunction through the Colorado courts. On December 12, 1996, the Colorado Court of Appeals reversed the permanent injunction granted by the District Court. *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Colo. App. 1996). While the case was on appeal to the Colorado Supreme Court, the state of Colorado dissolved Golden Eagle Charters, the subsidiary of Centennial Express, in May 1997 after Golden Eagle failed to file its 1997 corporate report.

On April 13, 1998, the Colorado Supreme Court ruled that the Court of Appeals erred in reversing the permanent injunction. *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1997) (en banc). The FAA was not a party to the state court proceedings and did not participate in developing the state court record. The Colorado Supreme Court declined to defer to the FAA's primary jurisdiction. It found that the issue was not Federally preempted under the 49 U.S.C. § 41713(b)(1) provision prohibiting state or local regulation of "price, route or service of an air carrier" but rather fell within the proprietor exception in § 41713(b)(3). The majority also held that the ban did not violate the FAA grant assurance requiring the sponsor to "make its airport available as an airport for public use on fair and reasonable terms without unjust discrimination to all types, kinds, and classes of aeronautical users." Additionally, the majority said that "the authority's ban on scheduled service is necessary to ensure safe operation of the airport" and that "increased congestion is sure to have an impact on safety." *Id.* at 596.

After investigation, the Director of the FAA's Office of Airport Safety and Standards rendered an initial determination on August 21, 1998, under 14 C.F.R. § 16.31 regarding the complaints filed by Centennial Express and Thomas Kehmeier. The Director found that the FAA was not bound by the Colorado Supreme Court's decision. He determined that the Airport Authority violated Federal law and its grant assurances by banning scheduled service at Centennial Airport.

The Airport Authority requested a hearing under 14 C.F.R. Part 16, Subpart F. On September 28, 1998, the Deputy Chief Counsel issued a Hearing Order identifying the parties and issues. Prior to the hearing, Greenwood Village moved to intervene as a party under 14 C.F.R. § 16.207, and the hearing officer granted the motion.

The hearing was held on November 12-13, 1998, in Denver, Colorado. The hearing officer's initial decision affirmed the Director's determination on all issues. The Airport Authority and Greenwood Village have filed the instant appeal of the hearing officer's initial decision.[4]

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[4] Citing 14 C.F.R. § 16.19, the City of Greenwood Village has filed a motion to strike a number of alleged factual misstatements in the reply brief of the FAA Office of Airport Safety and Standards. In response, counsel for the FAA Office of Airport Safety and Standards has filed a document in which it claims that Greenwood's motion was actually an impermissible additional brief that should be stricken.

The FAA Office of Airport Safety and Standards is correct that additional legal argument would be impermissible, because the rules of practice permit only one brief per party. 14 C.F.R. § 16.241(f)(2) ("parties may file one brief on review to the Associate Administrator"). Greenwood's motion, however,

Under the Rules of Practice the Hearing Officer may "issue an initial decision or rule in a party's favor only if the decision or ruling is supported by, and in accordance with, reliable, probative, and substantial evidence contained in the record and is in accordance with law." 14 C.F.R. § 16.227. Otherwise, the Hearing Officer's decision or ruling is subject to reversal. This standard of proof will guide the following discussion of the parties' arguments on appeal.[5]

III. Standing

Greenwood Village argues that the Hearing Officer should have dismissed the complaints because Complainants Centennial Express/Golden Eagle Charters and Thomas Kehmeier lack standing under 14 C.F.R. Part 16. Greenwood points out that Centennial Express no longer holds a Part 135 air carrier certificate and Golden Eagle Charters has been dissolved. As for Kehmeier, Greenwood argues that he can no longer benefit from scheduled service at Centennial Airport because he has moved away from Denver. Greenwood contends that as a shareholder of Centennial Express, Kehmeier is simply a proxy for Centennial Express and thus he lacks standing just as Centennial Express does.[6]

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briefly lists alleged factual misstatements. Thus, it does not constitute an improper additional brief and it has been considered in reaching this decision.

[5] Any arguments not specifically addressed have been considered and found to be without merit.

[6] Greenwood has several additional arguments relating to standing. Greenwood argues that the Hearing Officer erred in

At the outset, it should be noted that standing requirements in administrative adjudications are less strict than in Federal court actions. As the court stated in *ECEE, Inc. v. Federal Energy Regulatory Commission*, 645 F.2d 339, 349 (5th Cir. 1981):

> Administrative adjudications . . . are not . . . article III proceeding[s] to which either the "case or controversy" or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court. *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976). *Accord, Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 611-17 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 439 U.S. 1052 (1978).

The Rules of Practice for Federally-Assisted Airport Enforcement Proceedings in 14 C.F.R. Part 16 provide that "[a] person directly and substantially affected by any alleged non-compliance may file a complaint with the Administrator." 14 C.F.R. § 16.23(a). Assuming, *arguendo*,

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suggesting that the Part 13, Subpart D complaints could cure the lack of standing under Part 16, and that it is unfair for the agency to apply only the sections of Part 16 that favor the agency. Moreover, Greenwood believes that the Hearing Officer erred in reasoning that because the FAA could have brought its own case under 14 C.F.R. § 16.101, it is irrelevant whether these particular Complainants lack standing. According to Greenwood, the agency chose not to bring a case of its own, and even if had it done so, it could not have based it on a live controversy, because there is currently no Part 135-certificated carrier seeking to offer scheduled service at Centennial Airport.

that the standing requirement of Part 16 applies,[7] it is difficult to imagine a stronger case for a direct and substantial effect on Complainants. The Airport Authority obtained an injunction that immediately brought Centennial Express's scheduled passenger operations at Centennial Airport to a halt, forcing it out of business there. Kehmeier is a shareholder of Centennial Express and therefore is directly and substantially affected by any prohibition on Centennial Express's revenue operations. The very facts that Greenwood points to – the surrender of the Part 135 certificate and the dissolution of Golden Eagle Charters – are perhaps the most compelling evidence possible that the Airport Authority's alleged noncompliance had a direct and substantial effect on Complainants.[8] As Kenneth Culp Davis states in § 24.1 of the

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[7] Arguably, the less stringent standing requirements of Part 13, Subpart D apply because Centennial Express and Thomas Kehmeier filed their complaints under Part 13, Subpart D before Part 16 came into existence. (Part 16 applies to complaints filed and investigation initiated by the FAA on or after December 16, 1996. 14 C.F.R. § 16.1(d). For complaints filed earlier, Part 13, Subpart D continues to apply.)

Part 13, Subpart D permits any person to file a complaint with the Administrator with respect to anything done or omitted to be done by any person in contravention of any provision of any Act or any regulation or order issued under it, as to matters within the jurisdiction of the Administrator. 14 C.F.R. § 13.5. For the agency to apply the stricter Part 16 rules for standing and pleading to the complaints already accepted and pleaded under more lenient rules in Part 13, Subpart D arguably would have violated Complainants' due process rights.

[8] Section 16.23(a) does not state that the person directly and substantially affected must hold a Part 135 certificate. Note that the Airport Authority has admitted that it has the discretion to

Administrative Law Treatise (2nd ed. 1983), "A main objective in reforming the law of standing should be to strip down the law to one simple proposition: one who is adversely affected in fact should never be denied standing."[9]

Even if Complainants lacked standing, dismissal of the proceeding would be inappropriate at this point because the FAA, with its statutory mandate to ensure that Federally-funded airports comply with their grant assurances, would remain as party and as prosecutor. The FAA became a party after the Director of the FAA's Office

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consider an application for scheduled passenger service even where the applicant does not possess an FAA operating certificate at the time of application. Exhibit 20e.

[9] Greenwood argues that the Airport Authority's ban on scheduled passenger service caused neither the surrender of Centennial Express's Part 135 certificate nor the dissolution of Golden Eagle Charters. It is hard to believe that no causal connection exists, given the timing of the surrender (immediately after the Airport Authority obtained an injunction again [sic] Centennial Express's scheduled operation). Centennial Express went to some trouble to set up scheduled operations at Centennial Airport. The injunction the Airport Authority obtained halting Centennial Express/Golden Eagle Charters' scheduled passenger operations certainly would not have helped the financial situation of Centennial Express and Golden Eagle Charters.

Regardless, even if there was no causal connection between the ban on the one hand and the surrender of the operating certificate and dissolution of Golden Eagle Charters on the other, the ban still had a direct and substantial effect on Centennial Express – Centennial Express/Golden Eagle Charters sought to operate scheduled passenger service at Centennial Airport, but the Airport Authority obtained an injunction stopping it from doing so.

of Airport Safety and Standards issued his initial determination finding the Airport Authority in violation of Federal law and its grant assurances and the Airport Authority requested a hearing. The Rules of Practice provide that: "The parties to the hearing are the respondent(s) named in the hearing order, the complainant(s), and *the agency*."[10] 14 C.F.R. § 16.203(b)(1) (emphasis added). They further provide, in relevant part, that, "*the agency attorney will serve as prosecutor* for the agency from the date of issuance of the Director's determination providing an opportunity for hearing." 14 C.F.R. § 16.203(b)(2) (emphasis added). In accordance with these provisions, the Hearing Order named the FAA Office of Airport Safety and Standards as a separate party, "as prosecutor *for the agency*." (Emphasis added.) *See also* 14 C.F.R. § 16.3, which defines "agency attorney" as an attorney "who *represents the FAA* during the investigation of a complaint or at a hearing on a complaint, and who prosecutes on behalf *of the FAA* . . . . "

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[10] The FAA Office of Safety and Standards has indicated in its reply brief that if the complaints were dismissed, the Director would begin an investigation under 14 C.F.R. § 16.101. The FAA does not need a "live" complainant to initiate an investigation. Notice and the opportunity for informal resolution under Section 16.101 at this point would be *pro forma*. The Airport Authority has had ample notice of the FAA's position, and the Airport Authority's refusal to comply with its grant assurances after an FAA investigation and several decisions does not suggest an interest in informal resolution. Under the circumstances, complaint dismissal would be wasteful of agency and taxpayer resources.

Thus, the role of the FAA Office of Airport Safety and Standards is not to represent Complainants, but to represent the agency, acting to protect the public interest. The role of the private complainant is simply to bring to the agency's attention apparent violations of airport grant assurances. *See* 61 Fed. Reg. at 53,999 (October 16, 1996), noting that the FAA is the party with the burden of proof and that the Rules of Practice give Complainants party status only to assist the FAA in the development of the factual record.

In summary, Complainants Centennial Express and Thomas Kehmeier have standing because the Airport Authority's ban on scheduled passenger service substantially and directly affected them. In addition, the FAA has standing by operation of the rules.[11]

IV. Mootness

As for the Airport Authority's and Greenwood's argument that this proceeding is moot, it is undisputed that the ban on scheduled passenger service continues in

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[11] While Greenwood claims that the FAA intentionally destroyed evidence "highly relevant" to its standing claim – *i.e.*, the Part 135 operator file for Centennial Express/Golden Eagle Charters – the record indicates that the local FAA Flight Standards District Office destroyed the file along with other inactive files several years ago when moving FAA Denver-based field offices to the new Denver International Airport. In any event, Greenwood has not shown how the Part 135 file is relevant to this proceeding.

place at Centennial Airport.[12] Thus, this case presents a live controversy because the FAA, as a party, has a genuine interest in enforcing the applicable Federal statutory provisions and grant assurances.[13]

V. Due Process

Under the Rules of Practice in Part 16, a Hearing Officer rather than an Administrative Law Judge presides over the hearing. (*See, e.g.*, 14 C.F.R. § 16.202, detailing the powers of the Hearing Officer, which include presiding over the hearing and issuing an initial decision.) Greenwood argues that the FAA Deputy Chief Counsel violated its due process rights by declining to amend the hearing order to include the issue of whether the Hearing Officer should have referred the case to an Administrative Law Judge for a hearing under the Administrative Procedure Act (APA).

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[12] To support its mootness argument, Greenwood states that there are currently no Part 135-certificated carriers seeking to offer scheduled service at Centennial Airport. Assuming, *arguendo*, that Greenwood's representation is still accurate, these proceedings are not moot because the Airport Authority has conceded that one need not have a Part 135 certificate at time of application. In addition, the Airport Authority's ban would likely discourage potential carriers from applying to operate scheduled service.

[13] Also, because the mootness doctrine arises from the case or controversy requirement for Article III courts, it does not necessarily apply to proceedings before Article I executive branch administrative proceedings.

Greenwood's Standing to Raise Issues

In this proceeding, the Director withheld approval of the *Airport Authority's* new grants – not Greenwood's. Greenwood is merely an intervenor.[14] Under 49 U.S.C. § 47106(d), the statute under which the Director's Determination withheld approval of new grants, only the Airport Authority, as the airport sponsor, may request a hearing. Significantly, the Airport Authority, the only respondent with the statutory right to a hearing, has not argued that an Administrative Law Judge rather than the Hearing Officer should have heard its case.

Greenwood, having no right to request a hearing, is outside the "zone of interests" protected by 49 U.S.C. § 47106(d). *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987). As a result, Greenwood is without standing to raise the issue of who should have heard this case.

Inapplicability of APA

Even if the Airport Authority, rather than Greenwood, had raised the same argument – *i.e.*, that the APA requires that an administrative law judge hear this case – it would still fail. Greenwood argues as follows:

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[14] The section in the Rules of Practice regarding intervention provides that "Participation under this section is at the discretion of the FAA, and no decision permitting participation shall be deemed to constitute an expression by the FAA that the participant has such a substantial interest in the proceeding as would entitle it to judicial review of such decision." 14 C.F.R. § 16.207(d).

> . . . the Hearing Officer did not satisfy the APA's separation of functions doctrine because he is an FAA attorney in the Procurement Legal Division of the Office of the Chief Counsel. The Office of the Chief Counsel is responsible, *inter alia*, for investigations and enforcement actions by the FAA. The Hearing Officer, therefore, was conspicuously under the supervision and direction of an agency employee who is engaged in the performance of investigative or prosecuting functions for the agency. Since the Hearing Officer and FAA investigators are responsible to the FAA Administrator through the same chain of authority (the Chief Counsel), the Hearing Officer's role as adjudicator in this case violated the APA.

(Appeal Brief at 33.)

The APA, however, does not apply to hearings provided under 49 U.S.C. §§ 47106(d) & 47111(d).[15]

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[15] The wording of 49 U.S.C. § 47106(d) indicates that Congress did not intend to require full agency adherence to all APA Section 554 components. Unlike another part of the same statute (the Airport and Airway Improvement Act of 1982, as amended) which *is* subject to the APA and which expressly requires a hearing before an administrative law judge under 14 C.F.R. Part 302 [*see* 49 U.S.C. 47129(c)], 49 U.S.C. § 47106(d) only requires "an opportunity for a hearing." Section 554 of the APA does not apply where the statute, rather than requiring a hearing *on the record*, simply requires an opportunity for a hearing without more. *Friends of the Earth v. EPA*, 966 F.2d 690, 6593 [sic] (D.C. Cir. 1992); *St. Louis Fuel and Supply Co. v. FERC*, 890 F.2d 446, 448 (D.C. Cir. 1989).

Part 16's Separation of Functions Provision

Although the APA does not apply, to ensure the integrity of the decisionmaking process, the Rules of Practice in 14 C.F.R. Part 16 include a provision separating investigative/prosecutorial functions from adjudicative/decisionmaking functions. *See* 14 C.F.R. § 16.5(b), providing that an agency employee who investigates or prosecutes will not advise or communicate substantively about the case with the hearing officer or the Associate Administrator regarding their respective decisions (except as counsel or witness in public proceedings).[16]

Contrary to Greenwood's argument, the Chief Counsel is not an investigator/prosecutor under the Rules of Practice in Part 16. Instead, the Chief Counsel advises the Associate Administrator, who issues the agency's final decision in Part 16 cases. *See* 14 C.F.R. § 16.5(c), stating that "[t]he Chief Counsel . . . advises the Associate Administrator . . . regarding any case brought under this part." Thus, the Chief Counsel's function in Part 16 cases is adjudicative, not investigative or prosecutorial.

The only attorneys who investigate and prosecute Part 16 cases are "agency attorneys." *See* 14 C.F.R. § 16.5, providing that "[p]roceedings under this part . . . will be prosecuted by an agency attorney." The Rules of Practice

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[16] As the FAA explained in the Notice of Proposed Rulemaking for 14 C.F.R. Part 16: "Separation of functions is not required by statute because hearings under part 16 would not be subject to APA hearing requirements; however, the separation is provided to promote confidence in the impartiality and integrity of decisions under the new procedures." 59 Fed. Reg. 29,880, 29,883 (June 9, 1994).

specifically define "agency attorney" to exclude the Chief Counsel. *See* 14 C.F.R. § 16.3, providing that "an agency attorney shall not include the Chief Counsel . . . . " The record contains no evidence that any agency employee violated Section 16.5(b). The Hearing Officer was completely independent of the Chief Counsel in all matters pertaining to this case from the date of his appointment until he issued his initial decision.

VI. Collateral Estoppel

Both the Airport Authority and Greenwood argue that the Hearing Officer erred in failing to find that the FAA must extend full faith and credit to the Colorado Supreme Court's decision.[17] They argue that collateral estoppel bars relitigation of the issues in the instant proceeding.

Collateral estoppel, or issue preclusion, is the branch of the res judicata doctrine that prevents a party from relitigating an issue of fact or law that has been decided in an earlier suit. *Wilder v. EPA*, 854 F.2d 605, 616 (2d Cir. 1988). Section 1738 of 28 U.S.C. requires Federal courts to give effect to the collateral estoppel rules of the state that rendered a prior judgment where the same issues are raised later in a Federal proceeding. *Id.* Section 1738 of 28

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[17] The Colorado Supreme Court upheld the State District Court's injunction on Centennial Express's scheduled passenger operations at Centennial Airport. The court held that Federal law does not preempt the Airport Authority's ban on scheduled passenger service. It also held that the ban is necessary for the safe operation of the airport and that it serves the civil aviation needs of the public.

U.S.C. directs that judicial proceedings of the court of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." Federal administrative agencies as well as courts must adhere to 28 U.S.C. § 1738. *Midgett v. United States*, 221 Ct. Cl. 171, 189 (1979).

To accord full faith and credit to a given state-court judgment, a Federal court or administrative agency must give a prior state-court judgment "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2nd Cir. 1993), quoting *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984). *See also American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (stating that "[u]nder 28 U.S.C. § 1738, the Federal court follows the state rule of repose"). Thus, Colorado's rules relating to collateral estoppel bear examination.

Colorado's Estoppel Requirements Unmet

Colorado's highest court has held as follows:

> Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) the issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom the doctrine is asserted has had a full and fair

> opportunity to litigate the issue in the prior proceeding.

O'Neill v. Simpson, 958 P.2d 1121 (Colo. 1998).

In the instant case, several of the above-listed requirements under Colorado law for collateral estoppel are unmet. First, the Airport Authority and Greenwood have attempted to assert estoppel not just against Centennial Express and Thomas Kehmeier, but also against the FAA.[18] The FAA, however, was not a party to, nor was it in privity with a party to, the prior proceeding.[19] As a result, the FAA did not have a full and fair opportunity to litigate the issues in the prior proceeding.[20]

While the Airport Authority and Greenwood argue on appeal that *Town of Deerfield v. FCC*, 992 F.2d 420 (2d

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[18] For a discussion of the agency's role as party to the proceeding under the regulations, *see supra* p. 9.

[19] Arguably, neither was Thomas Kehmeier. Kehmeier was not a party to the prior proceeding and under Colorado law, he may not have been in privity with any party, even though he was a shareholder of Centennial Express, which was a party to the prior proceeding. In *Falkenberg v. Sternberg*, 388 P. 2d 771 (Colo. 1964), the Colorado Supreme Court held that a corporate president who owned 98% of the corporate stock was not precluded from asserting a claim in his individual capacity against an architect even though a similar claim by the corporation had been dismissed in a prior proceeding. *See also Foley Custom Homes v. Flater*, 888 P.2d 383, 364 [sic] (Ct. App. 1994), *citing Falkenberg v. Sternberg*, 388 P. 2d 771 (Colo. 1964) and holding that Foley Custom Homes, a closely held corporation, and Daniel Foley, who owned 50% of the company's stock, were not in privity.

[20] The FAA simply does not have the resources to intervene in the innumerable state court proceedings in which aviation issues arise.

Cir. 1993) supports their argument that collateral estoppel applies, *Deerfield* is distinguishable. In *Deerfield*, in the proceeding before the FCC, the party against whom estoppel was sought (an individual named Joseph Carino) had been a party to the prior proceedings in both state and Federal court. The FCC was not a party to either the prior proceedings in state or Federal court, or to the proceedings before the FCC. Thus, in *Deerfield*, the collateral estoppel requirement under Colorado law of identity of parties was met, whereas the requirement is not met in the instant case.[21]

Second, even if collateral estoppel applied to some of the issues in the instant proceeding, it would still not apply to all of them. The Colorado Supreme Court did not decide all of the issues in the instant proceeding. A close examination of the court's opinion reveals that it did not decide whether the Airport Authority violated Federal law relating to the granting of exclusive rights, which forms the basis for two of the six independent findings in the Director's Determination.

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[21] *Deerfield* is also distinguishable because the FCC issued an order that conflicted with that of a Federal Article III court. Under the Constitution, Federal Article III courts may decide only "Cases" or "Controversies." U.S. Const. Art. III, § 2, cl. 1. They are not permitted to render advisory opinions. *Deerfield*, 992 F.2d at 427. The U.S. Court of Appeals for the Second Circuit held that the FCC, by issuing a decision that conflicted with that of a Federal District Court, had improperly attempted to render a Federal Article III court's decision a mere advisory opinion. *Id.* at 428-29.

In contrast, in the instant case, a Federal Article III court has never decided any of the issues.

Supremacy Clause Trumps 28 U.S.C. § 1728

In any event, 28 U.S.C. § 1728, which directs that Federal courts and agencies must give state court judgments full faith and credit, is limited by the Supremacy Clause of the U.S. Constitution. *Midgett*, 221 Ct. Cl. at 189. Federal courts will not give effect to a judgment or decree of a state court that would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established Federal policy. *Id.*, citing *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 (1957); *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977); *American Mannex Co. v. Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972).[22]

The Colorado Supreme Court's decision restrained the sovereign power of the United States by upholding and imposing a ban by a state authority on scheduled passenger flights at a Federally-funded airport. The ban violates Congress' express prohibition, in 49 U.S.C. § 41713(b)(1), on state and local regulation of air carrier rates, routes, or services. In the Airline Deregulation Act, Congress preempted state and local regulation of rates, routes, or services of air carriers to ensure that the states would not undo Federal deregulation of domestic air transport. *Morales v. TWA*, 504 U.S. 374, 378-379 (1992). The Airport Authority's ban on scheduled service is inconsistent with the Airline Deregulation Act's goals of

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[22] Even under Colorado law, collateral estoppel is an equitable doctrine and need not be applied in every case. *Western Group Nurseries v. Pomeranz*, 867 P. 2d 12, 15 (Ct. App. Colo. 1993).

furthering "the availability of variety of adequate, economic, low-priced services without unreasonable discrimination" (49 U.S.C. § 40101(4)), and "encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry" (49 U.S.C. § 40101(13)).

A safe and efficient system of public use airports cannot be maintained if each Federally-funded airport is free to impose its own ban on certain types of air service without an adequate basis in fact or law. The national system would weaken and balkanize. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 172 (1st Cir. 1989), referring to the "[b]alkanizing forces of state and local regulation," and stating that in reducing Federal economic regulation of aviation, Congress did not intend to leave a vacuum for state and local governments to fill.

VII. Burden of Proof

According to Greenwood, the Hearing Officer erred in finding that the Airport Authority and Greenwood bore the burden of proving that a ban on scheduled passenger operations was necessary for the safe operation of the airport. Instead, Greenwood argues, the Hearing Officer should have required the FAA to show that the Director's Determination (finding unlawful the Airport Authority's ban on scheduled passenger service) would "enhance safety and security" in air commerce in the Denver region. To support its argument, Greenwood cites 49 U.S.C. § 40101(d), which provides as follows:

§ 40101. Policy

. . .

(d) Safety Considerations in Public Interest. – In carrying out subpart III of this part [49 U.S.C. §§ 44101 – 45304, entitled "Safety"] and those provisions of subpart IV [49 U.S.C. §§ 46101 – 46507, entitled "Enforcement and Penalties"] applicable in carrying out subpart III, the Administrator shall consider the following matters, among others, as being in the public interest:

(1) assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce.

49 U.S.C. § 40101(d).

Section 40101 of Title 49 does not apply. First, it does not deal with the issue of the proper allocation of the burden of proof. Second, it expressly applies only to subpart 111 (49 U.S.C. §§ 44101 – 45304) and subpart IV (49 U.S.C. §§ 46101 – 46507), whereas the authority for the instant proceeding (the statute under which the Director's Determination withheld approval of new grants) is 49 U.S.C. § 47106(d). The Airport Authority allegedly violated 49 U.S.C. § 47107(a)(1) regarding economic discrimination; 49 U.S.C. §§ 47107(a)(4) and 40103(e), regarding exclusive rights; and 49 U.S.C. § 41713(b)(1), regarding Federal preemption of state regulation of air carrier prices, routes, and services. None of these provisions are found in subparts III and IV.

The allocation of the burden of proof in these proceedings is set by 14 C.F.R. § 16.229. Under Section

16.229, the agency has the burden of proving noncompliance with Federal law and the grant assurances, but a party who asserts an affirmative defense has the burden of proving the affirmative defense. 14 C.F.R. § 16.229(a) & (b).

The following facts are undisputed:

- As a precondition for receiving Federal funds, the Airport Authority agreed to make the airport available for public use on reasonable conditions and not to discriminate unjustly.
- When the Airport Authority accepted Federal funds, no ban on scheduled passenger service existed.
- After the Airport Authority had accepted millions of dollars in Federal funds, it imposed the ban.
- The Airport Authority's ban leaves the airport unavailable for a certain type of public use – specifically, scheduled passenger service. The ban also discriminates between scheduled and unscheduled passenger service.

The Airport Authority's defense in this proceeding has been that its discrimination against scheduled passenger service is justified. It argues that the grant assurance regarding non-discrimination expressly permits the airport sponsor to "prohibit . . . any type, kind, or class of aeronautical use at the airport if . . . necessary for the safe operation of the airport or . . . to serve the civil aviation needs of the public."

In determining what constitutes an affirmative defense, fairness and convenience are relevant considerations. WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1271. Thus, if all or most of the relevant information is within the control of the defending party, then fairness and convenience suggest that the matter should be considered an affirmative defense. *Id.* In the instant case, the Airport Authority determined that safety and the civil aviation needs of the public required its ban on scheduled passenger service. The Airport Authority is in the best position to provide the evidence on which it based its safety and public needs determination.

Another relevant consideration in determining whether a matter constitutes an affirmative defense is whether the party bringing the action will be taken by surprise by the assertion of the defense at the trial or hearing if the defense is not pleaded affirmatively. *Id.* This consideration also supports the Hearing Officer's determination that safety constituted an affirmative defense. In the instant case, the agency and complainants would have been taken by surprise if the Airport Authority had not affirmatively pleaded the "safe operation and public civil aviation needs" defense in its answer.

For these reasons, the Hearing Officer did not err in ruling that the Airport Authority's justifications for discrimination constitute affirmative defenses which the Airport Authority had the burden of proving.

XIII. Reasonableness of Justifications for Ban

A. Safe Operation of the Airport

The Airport Authority and Greenwood claim that the ban on scheduled passenger service is necessary for the safe operation of the aircraft. To support their claim, they argue as follows:

- Centennial Airport lacks a terminal, baggage claims system, and passenger security system.

- There was testimony at the hearing that it is a safety problem to mix different types of aircraft in the same airspace environment.

- The National Transportation Safety Board (NTSB) has recommended, as a class 2 priority action,[23] that the FAA seek legislative action limiting scheduled passenger service to airports holding Part 139 certificates[24] and Centennial Airport lacks a Part 139 certificate.

- The local fire department chief testified that his personnel could not respond to fires at Centennial Airport within 3 minutes, and therefore, the chance of survivable crash victims was nearly zero.

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[23] Tr. 599.

[24] 14 C.F.R. Part 139 contains the rules governing the certification and operation of land airports that serve any scheduled or unscheduled passenger operations of air carriers that are conducted with aircraft having a seating capacity of more than 30 passengers. 14 C.F.R. § 139.1.

- Scheduled passenger service would require changes to Centennial Airport's infrastructure to maintain crowd control.

There are a number of matters that undercut the Airport Authority's arguments that safety requires the ban. First, the Airport Authority has failed adequately to explain how a terminal and baggage system are necessary for passenger safety. The connection is unclear.[25] As for a passenger security system, the FAA introduced into the record evidence that there is no legal requirement for security screening for the type of operation Centennial Express proposed.[26]

Second, while the Airport Authority has banned all scheduled passenger operations, it permits the same sizes and types of aircraft to carry passengers in unscheduled operations.[27] Thus, the testimony at the hearing that it is

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[25] A county commissioner testified at the hearing that a terminal was needed to protect passengers from hail storms. Tr. 97. He admitted, however, that Centennial Express had obtained, through a sublease, facilities through which to process passengers. Tr. 99. The commissioner was unable to offer any explanation as to how the lack of a baggage system presented a safety problem, though previously he had signed an affidavit stating that it did. Tr. 103.

[26] Tr. 105-07. The FAA's expert in aviation security testified that the size of the aircraft determines whether FAA regulations require screening. Tr. 426. Even when screening is required, the air carrier rather than the airport operator ordinarily provides for it. Tr. 430.

[27] The airport already has weight limits for its runways that would keep out aircraft that are too large to operate safely at the airport. Tr. 90. In any event, FAA regulations prohibit aircraft with a seating capacity of more than 30 passengers – scheduled

a safety problem to mix different types of aircraft in the same airspace, even if accurate, is inapplicable. Furthermore, the fire department response time is no different for passengers in unscheduled operations than it is for passengers in scheduled operations.[28] If the scheduled passenger operations using the same types of aircraft are unsafe, then how can the Airport Authority consider the unscheduled passenger operations safe, given that the only difference in the operations is whether the flights are scheduled?[29] Also, all operations at the airport, whether scheduled or unscheduled, would be conducted by pilots tested and licensed by the FAA, would use aircraft certificated by the FAA for airworthiness, would follow FAA operating rules, and would follow the direction of FAA air traffic controllers.

Third, if the Airport Authority's concern was that a high level of operations was causing congestion in the air or on the runways, affecting safety, then the Airport Authority should have attempted more narrowly focused alternatives first. The Airport Authority, however, admitted in its answers to interrogatories that congestion,

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or unscheduled – from operating at Centennial Airport, because the airport lacks a Part 139 certificate. 14 C.F.R. § 139.101. *See also* Tr. 229-30.

[28] The fire station is located about a mile and a half from the airport runways. Tr. 493.

[29] At the hearing, the Mayor of Greenwood was asked the following question: "There is nothing inherently more unsafe about the fact that a Beechcraft King Air is flying over your homes and schools on a scheduled basis as opposed to an unscheduled basis, is there?" His reply was no. Tr. 232. *See also* Tr. 417 (another witness to the same effect).

capacity, and environmental effects were not among the reasons for its ban on scheduled passenger service.[30]

Fourth, the record does not support Greenwood Village's argument that crowd control would be a problem. The Airport Authority banned Centennial Express's operation with a single six-passenger aircraft. It is difficult to believe that a scheduled operation using one six-passenger aircraft could cause crowd control problems.

As for the NTSB recommendation, the Airport Authority's claim that the NTSB recommendation formed the basis for the ban lacks credibility, given that the NTSB issued its recommendation *after* the Airport Authority banned scheduled operations. Thus, the Airport Authority's claim bears all the hallmarks of a *post hoc* rationalization.[31] Moreover, the NTSB recommendation was only a *recommendation*. The FAA's statutory duty is to decide if the recommendation should be implemented, either in its original or in a modified form. The FAA is not required to follow NTSB recommendations.[32]

For these reasons, the Airport Authority has failed to bear its burden of proving that the safe operation of the airport requires the ban.

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[30] Tr. 119-20.

[31] Note too that numerous airports in the region, as well as in the country as a whole, permit scheduled passenger service at predominantly general aviation airports without a Part 139 certificate. Tr. 111.

[32] Tr. 599.

B. Civil Aviation Needs of the Public

The Airport Authority and Greenwood claim that the ban on scheduled passenger service is necessary to serve the civil aviation needs of the public. They argue that permitting scheduled passenger service would conflict with Centennial Airport's designation as a general aviation reliever airport, and that the FAA should defer to regional and local planning.

Although Centennial Airport's primary function may be to serve general aviation, it does not logically follow that any level of scheduled Part 135 service is inconsistent with that primary function. The initiation of scheduled passenger service at Centennial Airport is unlikely to change the predominately general aviation role of the airport.[33] The claim that permitting both scheduled and unscheduled passenger operations would alter the character of the airport is speculative.[34] There have been no

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[33] The term "general aviation" does not have one generally accepted meaning. In some FAA definitions, "general aviation" does not include any air carriers, whether scheduled or unscheduled. Nevertheless, a county commissioner conceded at the hearing that the Airport Authority permits "a lot" of unscheduled air carriers to operate at Centennial Airport. Tr. 122. The commissioner also conceded that the Airport Authority has taken no significant actions to limit overall growth at the airport other than to ban Centennial Express's operation. For example, in the past year, it signed a 40-year lease plus an option to extend for 50 more years with a development company that plans on spending at least $3 million on infrastructure for a third fixed base operation on the airport. Tr. 122-23.

[34] Note that there was testimony at the hearing that Centennial Express's proposed operations would have had an

studies suggesting that scheduled passenger service would reduce general aviation use of the airport.[35] In the unlikely event that scheduled passenger service ever undermined the airport's reliever role, there were reasonable and nondiscriminatory restrictions short of a total ban which could have been attempted first. The Airport Authority admitted in its answers to interrogatories that it did not consider any of these alternatives to meet the civil aviation needs of the public before imposing the ban.[36] In fact, the Denver Regional Aviation System Plan itself recognizes that an airport may be required by its grant obligations to accept service that is inconsistent with its primary purpose. The Airport Authority and Greenwood do not dispute the Hearing Officer's factual finding that prior to 1993, the Airport Authority's policies permitted scheduled passengers [sic] service at Centennial Airport, notwithstanding its general aviation designation in regional planning documents.

If anything, the civil aviation needs of the public *support* the opposite policy – permitting scheduled service as well as unscheduled service at Centennial Airport. If the public does not want or need scheduled passenger service at Centennial Airport, market forces will lead to that result. The ban is both unnecessary and unlawful.

"insignificant" impact on the operations at Centennial Airport. *See, e.g.*, Tr. 496.

[35] Tr. 251.

[36] *See also* Tr. 118-19.

Multi-Airport Proprietor Rule

Congress made the receipt of Federal funds contingent upon an airport owner's agreement to make the airport available for public use and without unjust discrimination. As a result, a Federally-funded airport may not ordinarily ban a whole class of service. In light of case law, however, the FAA has carved out the following exception to the general rule. This exception is referred to as the multi-airport proprietor rule. It provides as follows:

> Where the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system under the same ownership and servicing the same community for use by a particular class or classes of aircraft. The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the owner's control and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity.

FAA Order No. 5190.6A.

The Airport Authority and Greenwood take issue with the FAA's multi-airport proprietor rule. They argue that there is no valid distinction between multiple airports controlled by the same owner, and multiple airports acting under a plan devised by a regional planning organization. However, the Airport Authority has failed to show that air traffic at Centennial Airport is approaching

or exceeding the maximum practical capacity. For example, in its answers to interrogatories, the Airport Authority conceded that capacity was not a basis for the ban on scheduled passenger service.[37] Thus, it is unnecessary to reach the issue of whether the Airport Authority has met the other requirements of the multi-airport proprietor rule.

For all of the reasons noted above, the Airport Authority has failed to bear its burden of proving that the civil aviation needs of the public require the ban.

IX. Proprietary Powers

The Hearing Officer determined that the Airport Authority's ban on scheduled passenger service violated the Federal statute that preempts state and local regulation of air carrier prices, routes, and service.[38] He rejected the Airport Authority's claim that the ban falls within the "proprietary powers" exception to the statute.[39] The Airport Authority and Greenwood argue on appeal that he erred in so doing.

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[37] *See also* Tr. 129, 250, 414.

[38] 49 U.S.C. § 41713(b)(1) provides, in relevant part, that "a State [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air carrier transportation. . . . "

[39] 49 U.S.C. § 41713(b)(3) provides, in relevant part, as follows: "This subsection does not limit a State [or] political subdivision of a State . . . that owns or operates an airport . . . from carrying out its proprietary powers and rights."

The Airport Authority argues in its appeal brief that the ban falls within the "proprietary powers" exception because the ban is necessary for the safe operation of the airport and to serve the civil aviation needs of the public. As discussed above, the Airport Authority has failed to bear its burden of proving that the ban is necessary either for the safe operation of the airport[40] or to serve the civil aviation needs of the public.[41] Hence, its argument that the ban falls within the "proprietary powers" exception fails. The Hearing Officer did not err in finding that Federal law preempts the ban.[42]

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[40] *See supra* p. 21.

[41] *See supra* p. 24.

[42] The Airport Authority and Greenwood also argue that even if the Airport Authority's total ban on scheduled operations was unlawful, operations at Centennial Airport would still be limited to nine-passenger aircraft, because a Federal statute went into effect in 1996 requiring airports to have a Part 139 certificate for scheduled operations involving aircraft of more than nine-passenger seats (49 U.S.C. § 44706), Centennial Airport does not have such a certificate, and the statute provides (in 49 U.S.C. § 44706(f)) that airport sponsors may not be forced to obtain a certificate.

While the Airport Authority and Greenwood argue that the statute is self-executing, the agency's position is that under 49 U.S.C. § 44706(e), the statute does not apply until 120 days after the agency sends implementing regulations and an economic impact report to Congress, and until that occurs, 30-passenger aircraft may operate at Centennial Airport. This issue will not be decided because it is not presented by the facts of this case. It is undisputed that the Airport Authority's ban on scheduled passenger service is total. The Airport Authority sought and obtained an injunction against Centennial Express's *six*-passenger aircraft.

XI. Conclusion

The Hearing Officer correctly affirmed the Director's determinations that the Airport Authority violated the following:

- 49 U.S.C. § 47107(a)(1) and standard Airport Improvement Program (AIP) grant assurance no. 22 (prohibiting economic discrimination).
- 49 U.S.C. §§ 47107(a)(4) and 40103(e) and standard AIP grant assurance no. 23 (prohibiting granting exclusive rights).
- 49 U.S.C. § 41713 (prohibiting state and local regulation of air carrier prices, routes, or services).

XII. Corrective Action

ACCORDINGLY, it is ordered that:

1. Arapahoe County Public Airport Authority (the Airport Authority) present a plan to the Airports Division, Northwest Mountain Region of the FAA within 60 days from the date of this final agency decision on how it intends to address the FAA's concerns by eliminating the violations outlined above;

2. Pending FAA approval of the corrective action plan specified in Ordering Paragraph 1, or until further notice, the Airport Authority is ineligible to apply for new FAA grants under 49 U.S.C. § 47106(d).[43]

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[43] The 180-day limit on suspension of eligibility contained in Section 47106(d) applies only to applications to receive AIP funds apportioned under 49 U.S.C. §§ 47114(c) and (e). The

FURTHER:

If the Airport Authority does not submit a corrective action plan in accordance with Ordering Paragraph 1 above, or petition for judicial review of this decision as set forth below, the FAA proposes to issue an order under 49 U.S.C. § 47122 directing the Airport Authority to eliminate the violations outlined above. The failure to comply with that order would result in termination of the Airport Authority's eligibility for new FAA grants.[44]

/s/ Susan L. Kurland
SUSAN L. KURLAND
Associate Administrator
for Airports

Issued on this 18th day of February, 1999.

Airport Authority is not eligible to receive these apportioned funds. Therefore, the 180-day limit does not apply.

[44] Persons with standing may seek judicial review of this decision in an appropriate United States Court of Appeals. The petition for review must be filed within 60 days. *See* 14 C.F.R. § 16.247 ("Judicial review of a final decision and order") for further information regarding judicial review.

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Centennial Express Airlines and Golden Eagle Charters d/b/a Centennial Express Airlines	)	
v.	)	Docket No. 16-98-05
Arapahoe County Public Airport Authority	)	
	)	

Centennial Express Airlines and Golden Eagle Charters d/b/a Centennial Express Airlines	)	
v.	)	Docket No. 13-94-03
Arapahoe County Public Airport Authority	)	
	)	

Thomas Kehmeier	)	
v.	)	Docket No. 13-94-25
Arapahoe County Public Airport Authority	)	
	)	

INITIAL DECISION OF THE HEARING OFFICER
PURSUANT TO 14 C.F.R. 16.241

Nancy D. Lobue, Karl B. Lewis, Kathleen A. Connon, and Frank San Martin, Office of Chief Counsel, Federal Aviation Administration, U.S. Department of Transportation, Washington, DC for the Federal Aviation Administration Office of Safety and Standards.

Ronald S. Loser and Brian A. Magoon, Brega & Winters P.C., Attorneys for Arapahoe County Airport Authority.

William H. Shawn, Gary L. Stanley, and David Fuentes, Shawn, Mann & Steinfeld, Attorneys for City of Greenwood Village, Colorado.

John Andrews, pro se, Centennial Express Airlines, Inc. and Golden Eagle Charters, d/b/a Centennial Express Airlines.

Thomas Kehmeier, pro se.

Before the Deputy Assistant Chief Counsel, Procurement Law Division, Anthony L. Washington, acting as Hearing Officer.

Introduction:

On September 9, 1998, the Arapahoe County Public Airport Authority (hereinafter referred to as the "ACPAA" or the "Authority") filed a request for a hearing under 14 C.F.R. Part 16, Subpart F. This request followed the Director of the Office of Airport Safety and Standards' determination issued on August 21, 1998, under 14 C.F.R. 16.31(d) ("Director's Determination"). This determination found that the Authority, by denying access to Centennial Express Airlines, Inc. ("CEA") was in [sic] not in compliance with the provisions of 49 U.S.C. 47107(a)(1), economic nondiscrimination; 49 U.S.C. 47107(a)(4) and 40103(e), provisions regarding exclusive rights: 49 U.S.C. 41713(b)(1), regarding federal preemption over regulations relating to air carrier prices, routes, services; and with the Authority's Federal grant agreements. The Director also found that by virtue of the violation of

section 41713(b)(1), the Authority exceeded its authority as a state or local government, under the Supremacy Clause of the United States Constitution.

On September 25, 1998, the Federal Aviation Administration (hereinafter referred to as the "FAA") through the Deputy Chief Counsel issued a hearing order under 14 C.F.R. 16.201. The Hearing Order, identified the Federal Aviation Administration Office of Airport Safety and Standards, the ACPAA, Thomas Kehmeier, and John Andrews (President), representing Centennial Express Airlines and Golden Eagle Charters, as parties to the proceeding. However, on October 2, 1998, the City of Greenwood Village, Colorado (hereinafter referred to as "Greenwood Village") moved, and was subsequently granted by the Hearing Officer interested party status as an intervenor to the proceeding pursuant to 14 C.F.R. 16.207.

A hearing was held on November 12 and 13, 1998 in Denver, Colorado. Under this proceeding and pursuant to 14 CFR 16.202(k), the Hearing Officer was directed to be [sic] address the following issues:

1. Whether the ACPAA may prohibit Centennial Express from operating scheduled air service at Centennial Airport without violating its federal obligations regarding economic nondiscrimination as set forth in 49 U.S.C. 47107(a)(1) and the Authority's grant agreements.

2. Whether the ACPAA may prohibit Centennial Express from operating scheduled air service at Centennial Airport without violating its federal obligations regarding exclusive rights as set forth in 49 U.S.C. 40103(e), 47107(a)(4), and the grant agreements.

3. Whether the ACPAA can prohibit Centennial Express from operating scheduled air services at Centennial Airport without violating provisions of federal law prohibiting state and local regulations of air carrier prices, routes, and services as setforth in 49 U.S.C. 41713(b)(1), and thereby exceeding its lawful authority under the Supremacy Clause of the United States Constitution.

4. Whether the Colorado Supreme Court opinion is binding on the Federal government.

5. Whether circumstances exist at Centennial Airport which permit action by the airport sponsor, acting within its proprietary powers, to prohibit or restrict scheduled passenger service for the safe operation of an airport.

6. Whether the statutory requirement for an airport certificate under Subpart (a) of 49 U.S.C. 44706 is self-executing and took effect upon the passage of the statute or whether the requirements under 49 U.S.C. 44706(a) and (b) do not take effect until the FAA has promulgated and adopted a regulation in accordance with the Administrative Procedures Act.[1]

7. Whether the Complainants have standing to maintain this action.[2]

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[1] The Hearing Officer petitioned the Deputy Chief Counsel, upon motion of ACPAA, to amend the Hearing Order to include this additional issue. On October 28, 1998, the Deputy Chief Counsel so amended the Hearing Order.

[2] The Hearing Officer petitioned the Deputy Chief Counsel to include two additional issues as raised by Greenwood Village in its two separate motions of November 12, 1998. The first issue, which may be characterized as a standing issue, has been

I have setforth only those facts which are relevant to and necessary for the resolution of this appeal. For the reasons set forth below I affirm the Director's Determination on all issues presented.

The Post Hearing Briefs of the parties, those documents submitted by the parties in accordance with the Hearing Officer's October Hearing Order, those documents identified in the Director's Determination (including the Director's Determination), the Hearing Transcripts (November 12 and 13, 1998) and exhibits, constitute the record in this matter.

Findings of Fact

1. In 1967, Centennial Airport opened as a public use airport and to serve as a general aviation reliever airport for the Denver community. (Phifer Testimony, Para. 6.) Centennial Airport is approximately 14 miles southeast of Denver Colorado. (Director's Determination, page 2.)

2. The airport is owned and operated by Arapahoe County Public Airport Authority ("ACPAA"), which was created by the Arapahoe County Commissioners in 1975. (ACPAA Exh. 2(d); Director's Determination, page 2.)

3. The planning and development of the airport has been financed, in part, with funds provided by the FAA

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determined to be an issue for the Hearing Officer to address. Accordingly, Hearing Order was amended on December 23, 1998. The Deputy Chief Counsel declined to amend the Hearing Order to include a decision on whether or not this proceeding should be assigned to an independent Administrative Law Judge.

under the Airport Improvement Program (hereinafter referred to as "AIP") as authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. 47101. Since 1983, according to the to [sic] Grant History for the subject Airport, the ACPAA has entered into numerous AIP grant agreements with the FAA and has received over $18.5 million in federal airport development assistance. The FAA makes the grants to the airport in exchange for "binding commitments in the form of grant assurances designed to assure that the public interest would be served." The assurances are required by 49 U.S.C. 47107(a). The statute states that a project grant application may not be approved unless the Secretary receives confirmation that the conditions of the grant assurances will be met. Further, under 49 U.S.C. 47122, the FAA has a statutory mandate to ensure that airport owners comply with the sponsor assurances. (Molar Testimony[3], pages 3 and 4.)

4. The Denver Flight Standards District Office, on June 18, 1986, issued an Air Carrier Certificate to Golden Eagle Charters, Inc., d/b/a Centennial Express Airlines. The certificate, which was reissued on December 20, 1994, contained the following salient language:

> Centennial Express Airways, Inc. has met the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and standards prescribed thereunder for the

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[3] The use of either "Testimony" or "Rebuttal Testimony" refers to the written direct and rebuttal fact testimony submitted by the parties in accordance with 14 C.F.R. 16.223(b).

> Aviation Regulations part 135/Operations Specifications 135 (30 or fewer seats). Requests for scheduled air service shall be reviewed for compliance with this policy, established weight limit, and the application, minimum standards.
>
> (Director's Determination, pages 11-12.)

5. On February 20, 1989, in the *Centennial Aerogram*, a newsletter published by the ACPAA, the authority stated its position regarding Part 135 aeronautical activities. In pertinent part, it states, as follows:

> It should be recognized that commercial service has always existed at Centennial in the form of Part 135 charter/taxi certification, which permits "for hire" passenger and freight service, whether scheduled or unscheduled. Such activity may not be prohibited but is limited to aircraft with 30 seats or less.
>
> (FAA Exhibit 1, Correspondence C-6. Director's Determination, page 12.)

6. In the October 3, 1989, *Centennial Aerogram*, the Authority stated as follows:

> No scheduled air carrier, either large or small, has applied to the Authority to operate at the airport. Should any apply, the Authority will consider only small, regional air service application. No action will be taken by the Authority to consider such application, however, without extensive community input and public hearing.
>
> (FAA Exhibit 1, Correspondence C-6 "Aerogram," page 3. Director's Determination, page 12.)

7. On March 12, 1992, the Authority adopted and promulgated a policy statement which states:

> The Authority reaffirms the original intent of the airport to service the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal Aviation Regulations Part 135 Operations Specifications 135 (30 or fewer seats). Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the application minimum standards.
>
> (FAA Exhibit 1, Correspondence C-5, "Centennial Airport Policy Statement. Director's Determination, page 13.)

8. Centennial Express Airway began its commercial operations at Centennial airport having purchased Golden Eagle Charters from Air Methods, Inc. CEA requested and was granted an Air carrier certificate, for a [sic] doing business as ("d/b/a") name of Centennial Express Airways and was subsequently reissued such certificate by the FAA. (Roy Rebuttal Testimony, Para. 6.)

9. On May 7, 1993 Centennial Express Airlines, Inc. ("CEA") filed an application with the ACPAA to Conduct Scheduled Passenger Service at Centennial. (ACPAA Exhibit 20(a).)

10. The CEA application proposed to operate 30-seat aircraft directly to eight cities, six scheduled flights per day. (ACPAA Exhibit 20(a), Executive Summary.) This proposed operation, at a sixty-percent load factor, would result in approximately 630,000 passengers a year at Centennial Airport. (Hearing Transcript at 323-28.)

11. Almost 1 year later, on April 8, 1994, CEA, by letter executed by its president John Andrews, filed an amended application. The amended application proposed operation for 30-seat aircraft to five major cities with seventeen departures per day. (ACPAA Exhibit 20(j), Executive Summary.)

12. On August 7, 1994, Thomas Kehmeier filed a complaint against the Airport Authority pursuant to 14 C.F.R. Part 13, Docket No. 13-94-25. (Director's Determination page 11.)

13. Mr. Kehmeier complained about Airport Authority actions dating from 1985, which actions denied access to scheduled passenger service, and also that such actions violated the Airport Authority's grant agreements with the Federal Aviation Administration. (ACPAA Exhibit 21(f).)

14. On September 8, 1994, the Airport Authority adopted revised and restated Minimum Standards. These Minimum Standards defined Centennial's "Airport Purpose" as:

> Any Authority action, undertaking or development that is consistent in maintaining the non-certificate status of the Airport and in preserving the Airport funding category as a "Reliever Airport" serving general aviation users. Under no circumstances shall the Airport Purpose include scheduled passenger services.
>
> (FAA Exhibit 1, Item 6 and Director's Determination, page 14.)

15. These Minimum Standards also defined "Air Carrier" as:

> . . . entity that provides scheduled passenger services and operates under the appropriate FAR (including but not limited to Parts 135 or 121 or under the exemption authority of FAR Part 298) with aircraft that provide no more than 30 passenger seats and are within the weight limitations established for the Airport in its Rules and Regulations. (This category is not consistent with the Airport Purpose and will not be allowed to operate at the airport unless required by final court order.)
>
> *Id.*

16. At the time that Centennial Express Airlines was enjoined from operating at Centennial, CEA held both Department of Transportation ("DOT") economic authority and FAA safety authority to operate scheduled passenger service at Centennial Airport. According to Jeffery A. Roy, Manager of the Denver Flight Standards District Office ("FSDO), who is responsible for Flight Standards Service programs in the states of Colorado and Wyoming the individuals intending to operate aircraft for commercial purposes, including carriage of persons, must comply with applicable DOT economic regulations and with FAA safety regulations before the FAA can issue the Air Carrier an operating certificate. (Roy Rebuttal Testimony, Para. 13.)

17. In April of 1994, Centennial Express Airlines submitted an amendment to its original application to ACPAA. Centennial Express Airlines proposed now to use 30 seat turbo-prop aircraft to five major cities, with 17 departures per day. The various business plans were determined by Mr. Andrews to be unrealistic in light of various cost

estimates. (ACPAA Exhibit, 20 (b) and Hearing Transcript at 343.)

18. Regardless of the business proposal, CEA, according to the testimony of its President John Andrews, continued to make the necessary provisions for acquiring or establishing the necessary facilities, i.e. parking, ticketing and baggage area to handle the proposed operations. (Hearing Transcript at 346.) At no time during this process did representatives of the Centennial Airport raise any safety or security concerns to CEA in response to any of these various business proposals. (Hearing Transcript at 350.)

19. Mr. Andrew's admitted that the flight from Centennial Airport ("a nine seat operation conducted with a very quiet turbo-prop aircraft") was a test of ACPAA's authority to prohibit scheduled service at the airport and may not have reflected the scope of service CEA ultimately planned to offer at the airport. (Andrew's Rebuttal Testimony, Para. 6 and Hearing Transcript at 332.)

20. On December 20, 1994, Centennial Express Airlines initiated scheduled passenger service between Centennial and Dalhart, Texas. (ACPAA Exhibits 21 (b) and Director's Determination, page 2.)

21. The Airline proposed to make four round trips a week between Centennial and Dalhart and five round trips a week between Centennial and Grand Junction Walker Field. The Airline also announced plans to add Amarillo, Texas and, in 1995, thirty passenger commuter flights between Centennial and Colorado Springs, Grand Junction and other western slope airports. The planned service would be consistent with their authority granted

by the FAA. (ACPAA Exhibit 21 (b) and Roy Rebuttal Testimony, Para. 8.)

22. Centennial Express Airlines voluntarily surrounded [sic] its part 135 certificate to the FAA in January 1995. Approximately 2 years later, on May 1, 1997, Centennial Express Airlines' wholly owned subsidiary, Golden Eagles Charters, Inc. was dissolved for failure to file its state of Colorado corporate report. (Roy Rebuttal Testimony, Para. 7.)

23. At the present time Centennial is ranked as the 24th busiest FAA air traffic control tower. (Administrator's Handbook-October 1998 issue.) (FAA Exhibit, R-1). The Administrator's Handbook indicates that Centennial Airport had approximately 275,000 operations during the period of January-July 1998). The Airports Master forecasts steady growth through the year 2015. The projection is that Centennial will be at 461,000 operations by the year 2015. The Airports full capacity is projected to be 525,000 per year. Roy concluded that since a 3rd fixed based operator (FBO) is building at Centennial, it would accommodate these increased operations in the future. (Roy Rebuttal Testimony, Para. 13.)

24. While ACPAA has placed no limits on the growth of operations at Centennial, except for its ban on scheduled operations of CEA and Air One Charter, which proposed to operate a charter under 14 CFR part 380. Neither of the companies operates on any schedule but could do so under their respective FAA safety authority. The air carriers could operate as long as the operations did not exceed 4 round trips per week, on at least one route between two or more points. Neither the Village of

Greenwood or the ACPAA challenged Mr. Roy on this point nor there is no evidence in the record to the contrary. (Roy Rebuttal Testimony, Para. 14.)

25. Mr. Roy also testified that that [sic] the type of operations proposed by CEA would have required no more services than those that currently exist at Centennial at the two existing FBO's. These operations would include ground handling services, fueling, maintenance, catering, rental cars, and passenger handling. (Roy Rebuttal Testimony, Para. 15.)

26. Mr. Andrews testified that CEA had entered into a sub-lease with Denver Jet Center, which would have provided the needed facilities to operate a fleet of aircraft of 30 seats or less. The sublease provided that Golden Eagle would be permitted to carry on certain operations approved in the lease between the Denver Jet Center and the ACPAA. This would have permitted use of the premises for the "purpose of operating aircraft charter, air freight, and commuter service" and have included space for a ticket counter, baggage handling, and a flight operator's area. Mr. Andrews also testified that a plan had been submitted for use of an existing parking lot adjacent to the Denver Jet Center and that CEA had also entered into discussions with another entity for additional parking space, if needed. (Andrews Rebuttal Testimony, Hearing Transcript at 346-352 and Director's Determination, page 15.)

27. There are several corporate flight departments in addition to air carriers based at Centennial Airport. The record indicates that the aircraft operating at Centennial Airport are consistent with the types of aircraft, which

CEA owned or planned on operating. The aircraft (King Air and SAAB 340) are within the weight limits at the airport and operate within the speeds consistent with the rest of the aircraft operating at Centennial Airport in many cases the aircraft which operate at Centennial Airport are much larger than the type of airplane utilized or planned to be utilized by CEA. (Roy Rebuttal Testimony, Para. 11 and 20.)

28. At the present time the ACPAA has no plans to make any design changes to the airport with respect to passenger terminal, adequate parking, security, or baggage system. According to the testimony of Mr. Brackney, the ACPAA has no financial resources to undertake such an endeavor. Mr. Brackney testified at hearing, as follows:

> [T]he airport wasn't designed for it [regularly scheduled passenger service] the previous boards have decided not to. This board continues to decide not to. And we do not have the ability from an infrastructure or dollar wise to do anything but continue the ban on regularly scheduled passenger service.
>
> (Hearing Transcript at 157 and 158.)

29. The Denver Regional Council of Government ("DRCOG") is a regional planning commission created under Colorado law to coordinate transportation issues in the Denver area. DRCOG has developed plans with FAA funding. DRCOG 2020 Denver Regional Aviation System Plan (prepared since 1974) and its 2020 Metro Vision Plan have concluded that Centennial Airport should continue as the "non-scheduled passenger service, transport-category, general aviation/reliever airport. DRCOG concluded that to permit scheduled services at Centennial

airport would not preserve Centennial Airport for the anticipated growth in general aviation operations. (Ryan Testimony, Para. 1-2 and 9.)

30. The ACPAA in the last year has entered into an agreement for a third FBO which will have the effect of increasing the number of aviation users at the airport in terms of tie down space and fueling, among other items. (Hearing Transcript at 122.)

31. The FAA Supervisor in the Denver Airports District Office (ADO), Nance Earley, who, among other responsibilities, is responsible for the district's capital improvement program, airports grant-in-aid, and passenger facility charge program, testified that Centennial Airport, despite the recent growth at the airport in terms of operations per year (408,000 operations in 1997 – capacity, 525,000 operations per year), is in a posltion to sufficiently accommodate the air carrier operations proposed by CEA. Mr. Earley further testified that the annual capacity figure "is not a hard, rigid, operational lid on the airport" because of all the variables involved in deriving the annual practical capacity number, e g. weather conditions, winds, runway utilization and configuration and that in his experience, airports continue to operate safely and efficiently in excess of the projected annual capacity cap. Earley Rebuttal Testimony, Para. 11 and Transcript 469 and 489.)

32. In 1994 and 1996, the National Transportation Safety Board recommended restricting scheduled services to airports certified under 14 C.F.R. Part 139. Commissioner John Brackney, appearing on behalf of the ACPAA testified that the November 1994 NTSB recommendation

formed an additional bases for the ACPAA ban on scheduled services at Centennial Airport. The ban on scheduled services however, occurred prior to the initial NTSB recommendation and therefore could not have been a basis for the prohibition. (Brackney Testimony, Para. 12-15.)

33. The Castlewood Fire Protection District serving Centennial Airport is not in a position to meet the 3 minute response time (reaching the mid-point of the runway being used for scheduled passenger service) test recommended by the NTSB for scheduled service for Part 139 Airports, according to the Fire Chief, Thomas P. Montoya. In part, the Castlewood Fire Protection district serving the airport is unable to meet the recommended 3-minute response time is due [sic] the offsite location of the unit. Chief Montoya, who is concerned about the safety of all passengers utilizing Centennial Airport, admitted that there is no difference in the survivability of passengers between scheduled and nonscheduled service at Centennial Airport, assuming similar types of aircraft. (Hearing Transcript 165 and 169. Montoya Testimony, Para. 3.)

34. The airport is not a Part 139 airport an [sic] accordingly is not required to meet the 3 minute response time. The 3 minute response time test has nothing to do with "getting control or mostly extinguishing a fire within 3 minutes." The 3 minute response time is only to test the response time of fire fighting equipment. Further, the aircraft proposed for use by CEA in scheduled air carrier service are the same type of aircraft that presently use Centennial Airport. (Castellano Rebuttal Testimony, page 5.)

35. All commercial scheduled services are expected by the FAA to operate in a safe manner. Before the airline, e.g., Centennial Express Airlines may operate it must satisfy the applicable requirements contained in the Federal Aviation Regulations. Centennial Airport (the ACPAA) is obligated to operate the airport in a safe and serviceable condition by allowing the proponent operator "to provide what is needed for a safe terminal situation. The ultimate burden for airline safety lies with the air carrier. The airport should provide the air carrier with a reasonable opportunity to provide the minimum facilities to conduct a safe operation. The air carrier (operator) can be responsible for any necessary ground facilities. It is normal practice in the aviation community for the carrier to assume certain costs, either directly or through lease arrangement payments." (Earley Rebuttal Testimony, Para. 20.)

36. At the present time the ACPAA has no plans to make any design changes to the airport with respect to passenger terminal, adequate parking, security, or baggage system. According to the testimony of Mr. Brackney, the ACPAA has no financial resources to undertake such an endeavor. Mr. Brackney testified, at hearing, as follows that:

> [T]he airport wasn't designed for it [regularly scheduled passenger service] the previous boards have decided not to. This board continues to decide not to. And we do not have the ability from an infrastructure or dollar wise to do anything but continue the ban on regularly scheduled passenger service.
>
> (Hearing Transcript at 157 and 158.)

Environmental issues

37. The restrictions imposed by the ACPAA relating to CEA or any commercial airline is not related to any identified environmental problem that the restriction was designed to control. The ACPAA admitted that safety and civil aviation needs of the public were the only reasons for restriction on scheduled service. The County Commissioner admitted that "neither congestion, capacity, or environmental impacts" were considered as reasons for the ACPAA's prohibition against regularly scheduled passenger service. (Hearing Transcript at 119-21.)

38. The Mayor of Greenwood Village testified that environmental concerns are a "very big concern" to Greenwood Village but that the overriding concern was in relationship to airport growth in general, and for the "unmitigated impacts of that growth" upon the Greenwood Village. (Hearing Transcript at 226.)

39. Greenwood Village proffered the testimony of Dr. Louis Cohn on environmental issues. Dr. Cohn testified that although Centennial Airport has additional capacity to accommodate additional aircraft arrivals and departures, the environmental resources of the surrounding community, specifically in relationship to noise, were "approaching saturation levels." Dr. Cohn also testified that the increased general aviation use at the airport directly increased automotive and truck traffic, which had the effect of straining local roads, police, and fire public services. Dr. Cohn was unaware of any analysis or studies quantifying the impact of scheduled passenger service at the airport. (Hearing Transcript at page 251.) Dr. Cohn did admit that CEA's proposed service, which

was to have included a Beech King Air E90, would not have significantly increased noise problems at Centennial Airport. Such aircraft, as used by CEA at the time of the prohibition of scheduled service was one of the quieter aircraft using Centennial Airport (Hearing Transcript at 253-256.)

40. Mr. Earley of the FAA testified that the ACPAA, as the airport sponsor has not taken prudent and timely lands use regulations in the past. The result is residential dwellings located in sensitive areas. In addition, the county has not taken effective action, to the extent reasonable and consistent with its grant assurances, "to restrict the use of land adjacent to or in the vicinity of the airport to activities and purposes compatible with normal operations, including the landing and take off of aircraft."

(Earley Rebuttal Testimony, Para. 27.)

41. Witnesses for the Greenwood Village, including its Mayor, David Phifer and City Council Member, Clark Upton, testified that transportation in the vicinity of Centennial Airport is presently at a "crisis level" and that the main thoroughfare has been designated by the county as one of the county roads with the lowest levels of service. They also testified that the airport would suffer a more serious problem if scheduled flights were permitted at Centennial Airport. According to Mr. Upton, the majority of scheduled passengers for scheduled flights would use individual cars to travel to the airport in contrast to corporate business travelers or private pilots who would travel in only one car in order to travel on their company's plane. The difference in behavior, Mr. Upton

believes would increase traffic. (Upton Testimony, Para. 2. Phifer Testimony Para. 10.)

42. The surface transportation congestion problems result not from aircraft growth but rather from the growth of the business community in the Denver Tech Center/southern metropolitan area over the past several years. (Earley Rebuttal Testimony, Para. 23.)

43. There are currently 12 part 135 air carriers based at Centennial Airport. Centennial Airport is used by other part 135 operators not based at the airport on a daily basis. These operators are in the business of supporting corporate flight departments as supplemental or primary charter sources. (Roy Rebuttal Testimony, Para. 9.)

44. CEA's original May 1993 application to the ACPAA proposed that through a two year, four phase plan that it would ultimately operate a minimum of six scheduled flights per day to each of the eight identified cities. CEA's operation was targeted to executives and employees of companies in the Denver area and was specifically planned to commence operations at or about the time of the Denver Airport opening and the closing of Stapleton Airport. It was contemplated that the proposed service would attract business travelers who desired to be closer to the South Metro Denver area. In addition, Centennial Airline proposed to use "Stage III (quiet) jet aircraft" and to build permanent passenger facilities, in order to be "best possible corporate neighbor to those who live near Centennial Airport." (ACPAA Exhibit, 20(a).)

45. Mr. James A. Dunlap, Deputy Director of Aviation/ Operations for Denver International Airport testified that

there are significant safety problems and economic inefficiencies presented when air traffic controllers are attempting to control different types of aircraft moving at materially different speeds using the same air space environment. He, however, provided no empirical data in support of his conclusions. (Dunlap Testimony, Para. 5. Hearing Transcript at 194-95.) Mr. Dunlap, appearing on behalf of the ACPAA, on cross-examination also testified that even with the Denver International Airport's mix of various aircraft, "large air craft to small air craft and speed" that the air traffic of these varied air craft are being conducted safely. (Hearing Transcript at 200.)

Director's Determination/Hearing Order

46. On August 21, 1998, the Director's Determination was issued. Docket Nos. 13-94-25, 13-95-03, and 16-98-05 were consolidated. (Director's Determination, page 18.)

47. The Director's Determination concluded that the Airport Authority, by unreasonably delaying adoption of Minimum Standards for the operation of scheduled Part 135 Air Carrier Services at Centennial and by adopting a moratorium on consideration of applications for scheduled Part 135 Air Carrier Services at Centennial in conjunction with the adoption of Minimum Standards for such services, violated its federal obligations regarding economic non-discrimination, violated its federal obligations regarding exclusive rights, and violated the prohibition on state and local regulations relating to a price, route or service of an air carrier. (Director's Determination, pages 32-33.)

48. The Director's Determination also concluded that the Airport Authority, by banning scheduled air carrier service on or about September 8, 1994, violated its obligations regarding economic non-discrimination, violated its federal obligations regarding exclusive rights, and violated the prohibition on state and local regulations relating to a price, route or service of an air carrier.

(Directors' Determination, pages 32 and 33.)

49. The sanction specified in the Director's Determination is that the Airport Authority is ineligible to apply for new FAA grants pursuant to 49 U.S.C. § 47106(d). (Director's Determination, page 33.)

50. On September 9, 1998, the Airport Authority filed a Request for Hearing. The Airport Authority requested an evidentiary hearing.

51. On September 25, 1998, the Deputy Chief Counsel issued his Hearing Order.

Colorado State Litigation

52. The Director's Determination referenced the litigation in the Colorado State Courts but found that the FAA is not bound to follow the reasoning of the Colorado courts, specifically, the Colorado Supreme Court because under the Supremacy clause the Federal Aviation Administration has primary jurisdiction into the instant matter. (Director's Determination, pages 2 and 3.)

A short recitation of the Colorado State litigation is as follows:

a. On December 22, 1994, the District Court, County of Arapahoe, State of Colorado issued a temporary restraining order prohibiting the airline from providing scheduled service at Centennial Airport.

b. On January 10, 1995, after conducting several hearings, a permanent injunction was issued by the district court prohibiting Centennial Express from conducting scheduled passenger service out of Centennial Airport.

c. Centennial Express Airlines, on July 18, 1995, appealed the Permanent Injunction Order to the Colorado Court of Appeals (Case No. 95 CA 307). On December 12, 1996, the Court of Appeals reversed the Permanent Injunction Order.

d. On April 13, 1998, the Supreme Court for the State of Colorado issued its decision, *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.* 956 P.2d 587 (Colo.1998). In the Supreme Court decision, two justices dissented and one abstained. The majority held that ACPAA had not discriminated against a particular operator because the ban on scheduled passenger service applied to all airport operators equally and that the prohibition was necessary to ensure the safe operation of the airport and served the civil aviation needs of the public. Therefore, the prohibition imposed by the ACPCA, [sic] according to the Supreme Court of Colorado, did not violate the FAA grant assurances requiring ACPAA to "make its airport available as an airport for public use on fair and reasonable terms without unjust discrimination, to all type, kinds and classes of aeronautical users."

The Colorado Supreme Court also held that federal law did not preempt the prohibition by the ACPAA against

scheduled passenger service. The Court refused to defer to FAA's primary jurisdiction over the matter. Although 49 U.S.C. 41713(b)(1) prohibits state or local regulation of "price, route, or service of an air carrier," the court held that the ACPAA actions to be permissible within the proprietor exception under the provisions of 49 U.S.C. 41713(b)(3).

Discussion

Full Faith and Credit
Supremacy Clause
49 U.S.C. 4171(b)(1)

There are a number of issues that will be addressed in this decision pursuant to the Hearing Order issued on September 25, 1998, as amended. The first issue that must be addressed is whether the Colorado Supreme Court decision in *Arapahoe County Public Airport Authority v. Centennial Express Airline, Inc.*, 956 P.2d 587 (Colo. 1998) is final and binding upon the Federal Aviation Administration. If that decision is binding then this decision perhaps need not go further.

Essentially Greenwood Village and ACPAA argue that the opinion of the Colorado Supreme Court is binding. The court in *Arapahoe* held that the ACPAA's ban on scheduled passenger service did not violate the FAA grant assurances requiring the sponsor to make available an airport for public use on fair and reasonable terms without unjust discrimination, to all types, kinds, and classes of aeronautical users. In addition, the Colorado Supreme Court ruled that the ACPAA's ban on scheduled service is necessary for the safe operation of the airport and serves

the civilian aviation needs of he [sic] public. Finally, the Colorado Supreme Court declined to defer to the FAA's primary jurisdiction over the matter, finding instead that the ACPAA's Minimum Standards and ban was not pre-empted by federal law, specifically, the 49 U.S.C. 41713(b)(1) provision, that prohibits state or local regulation of price, route, or service of an air carrier.

According to the arguments of Greenwood Village and the ACPAA the Colorado Supreme Court decision, which arose from an action that the Authority brought against Golden Eagle seeking a temporary restraining order and finally a permanent injunction for CEA's violation of the airport's ban on scheduled passenger service, addressed the same issues raised in the Parts 13 and 16 complaints. Since neither CEA nor the FAA has sought review of the decision by the United States Supreme Court (pursuant to 28 U.S.C. 1257) (1994), they argue, the Colorado Supreme Court decision has become final.

In support of their respective positions, the parties rely on the United States Court of Appeals' for the Second Circuit decision, *Town of Deerfield v. Federal Communications Commission*, 992 F.2d 420 (2nd Cir. 1993). The Federal Aviation Administration seeks to distinguish the instant matter from the *Town of Deerfield*. The FAA contends that *Town of Deerfield* is not applicable to the instant matter since the Court of Appeals decision did not decide whether a federal agency is bound by the judgement of a state court. The court in *Town of Deerfield* ruled that a federal agency could not ignore an Article III court judgment and that federal courts are required by federal statute to accord state courts "that same full faith and credit" as they are given in the courts of the state. The

FAA's argument to distinguish *Town of Deerfield* from the instant matter is less than persuasive.

The facts in the instant matter appear to be very similar to those in the *Town of Deerfield*. In *Town of Deerfield*, the FCC, just as the FAA in this matter, had notice of the proceeding but chose not to intervene or assert primary jurisdiction over the matter. The FAA was aware of the litigation in the Colorado courts beginning in 1994; at or about the time which Mr. Kehmeier filed his Part 13 Complaint. In addition, the FAA was kept informed of the status of the litigation by Mr. Andrew's, Centennial Express Airlines' President. (Hearing Transcript at 25-28.) In fact, the FAA took no substantive action on the Complaints until after the April 13, 1998 Colorado Supreme Court decision. (Hearing Transcript at 29.) Approximately 4 months after the decision was rendered by the Colorado Supreme Court, the FAA issued the Director's Determination.

Although the decision in *Town of Deerfield* appears to be analogous to the instant matter I do not believe that Colorado Supreme Court's decision is preclusive in the instant matter and therefore, determine that the court's decision need not be accorded full faith and credit in this matter. The necessary elements required for *collateral estoppel* (preclusion of issues actually decided in a former judicial proceeding)) and *res judicata* (same identity of the parties in the other proceeding) which are necessary to give full faith and credit to the Colorado Supreme Court decision are absent in this instant matter. Quite simply, neither the FAA nor the Complainant, Thomas Kehmeier were parties to the Colorado state court litigation. In the

instant matter, the FAA is a party to the current proceeding and is required under Part 16.229(a) to carry the burden of proof of noncompliance in relationship to the Director's Determination. (This is clearly different than the FCC's responsibility and role in *Town of Deerfield*. The FAA is also permitted under Part 16.101 to initiate its own investigations against the sponsor, proprietor, or operator of a federally assisted airport, which involve specified violations.) The FAA, more specifically, the Federal Aviation Administration Office of Safety and Standards ("AAS") is accordingly not acting as a neutral adjudicator.

There are issues in the Director's Determination, which were not addressed in the Colorado State litigation. As pointed out by the Government, the issue of whether or not the Authority's ban on scheduled passenger service violated its federal obligations as set forth in 49 U.S.C. 47107(a)(4) and 40103(e), and made applicable through standard AIP Grant Assurance No. 23 was not addressed in the Colorado state litigation. Accordingly, the decision in *Arapahoe*, can not be determined to have been dispositive of all the issues raised in the instant matter.

Finally, the *Arapahoe* decision is not entitled to full faith and credit, at least with respect to non-parties to the Colorado state litigation (Kehmeier and the FAA). I am persuaded by the Claims Court decision, *Midgett v. United States*, 603 F.2d 835 (Cl. Ct. 1979) which held that

> ***A judgement or decree of a state court whose effect would restrain the exercise of sovereign***

> ***power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in federal court.***
>
> *Id.* at 845.

In the instant matter it is clear that Congress intended for the FAA to maintain a safe and efficient nationwide system of public use airports that will meet the needs of the flying public. It is inconceivable that a safe and efficient nationwide system of public airports could exist if each federally funded airport had the authority to prohibit various types of service, without any reasonable basis as a matter of law or fact and moreover without consideration of grant assurance provisions or expertise of the FAA. I agree with the conclusion of the FAA that "the national air transportation system would weaken and eventually balkanize contrary to the express policies mandated by Congress." Contrary to the express prohibition of Congress, as set forth at 49 U.S.C. 41713(b)(1), the Colorado Supreme Court, among other items, effectively has permitted and sanctioned the local government's regulation of the routes and services of an air carrier.

The prohibition against scheduled services at Centennial Airport is preempted under 49 U.S.C. 41713(b)(1), which provides in pertinent part, as follows:

> (1) Except as provided for in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

To give full faith and credit to the Colorado Supreme Court decision, in *Arapahoe*, is inappropriate. It would permit inconsistent and conflicting laws to develop, as explained in the Director's Determination, as some jurisdictions permitted scheduled service into a particular airport while other jurisdictions barred it. In sum, the decision is contrary to important and established federal law and policy and therefore may not be given full faith and credit in the instant matter.

It perhaps would have been in the best interest of all the parties if the FAA had made known to the Colorado courts its position on preemption. However, the FAA did not do so and there is nothing in the instant record or advanced by the FAA to indicate the rationale for taking no action at the state court level. Regardless, it is my opinion that the state court was expressly preempted from taking jurisdiction in this matter. The Supremacy Clause of the United States Constitution authorizes Congress to enact legislation that preempts state laws.

Hornbook law instructs us that the Supremacy Clause of the United States Constitution authorizes Congress to enact legislation that preempts the ability of state and local governments to enact or enforce certain laws, regulations or policies. Preemption may occur by express terms, by implication when congress regulates an area in comprehensive fashion or by conflict between state and federal law. In the dissenting opinion in *Arapahoe*, Judge Bender, quoting from *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-379, 112 S.Ct. 2031, 2033, 119 L. Ed. 2d 157 (1992) stated at *Arapahoe*, supra, 602, that with respect to the Airline Deregulation Act ("ADA) that Congress did so: "To ensure that the States would not undo federal

deregulation with regulation of their own, the ADA included a preemption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier.' " Judge Bender concluded that the Authority's ban on scheduled passenger service relates to services of air carriers and is therefore preempted by Congress pursuant to the language contained in 49 U.S.C. 41713(b)(1).

The ban on scheduled service at Centennial Airport by the ACPAA represents a regulation of air carrier routes. It has the effect of banning regular operations over any route involving the Centennial Airport. Under *Butcher v. City of Houston*, 813 F. Supp. 515 (S.D. Tex. 1993) such prohibition on operating over any route is as much a regulation of routes as a local ordinance prohibiting such service.

Neither the Village of Greenwood nor the ACPAA have advanced any credible argument to suggest that the FAA does not have primary jurisdiction over issues raised in the instant matter. More specifically, neither Greenwood Village nor the ACPAA have advanced any arguments to seriously disturb the Director's Determination that the Authority's policy on scheduled service also violated 49 U.S.C. 41713(b)(1) and therefore exceeded its lawful authority under the Supremacy Clause. As articulated in the Director's Determination, 49 U.S.C. 4171(b)(1) prohibits state or local government from regulating the rates, routes, or services of an air carrier authorized to provide air transportation. The exception, established in 41713(b)(3), preserves the proprietor's rights "to conduct the business of an airport," but does not create any new powers for the proprietors.

Greenwood Village and the ACPAA claim that the ban on scheduled service is necessary because of concerns over ground congestion, operational safety and environmental impacts. Such circumstances, according to ACPAA and Greenwood Village, would therefore be permissible since the airport sponsor would be acting within its proprietary powers, to prohibit or restrict scheduled service for the safe operation of the airport. In light of the facts, the position taken by Greenwood Village and the ACPAA is neither tenable nor persuasive.

The record does not support the rationale behind the ACPAA's now stated reason for banning scheduled services. Safety, ground congestion and environmental issues appear to have had very little impact on the decision of the ACPAA in banning scheduled services to Centennial Airport. From the testimony in this proceeding, the community simply does not want any scheduled services at Centennial Airport. The mayor of the Village of Greenwood, David Phifer, stated as follows:

> If you force this airport authority board to accept one passenger service carrier you will force this authority board to accept anyone else who walks in front of it and asks for it. You will have no ability to say no once you allow the first one in.
>
> (Hearing Transcript at 241.)

The testimony of the individuals on behalf of Greenwood Village and the ACPAA consisted almost entirely of speculative and anecdotal statements. The statements concerning the effect and ultimate banning of scheduled services to Centennial Airport although sincere were for the most part not supported by any type of quantitative

analysis of the likely impacts of scheduled airline services to Centennial Airport. It is almost impossible to gauge the impact or effect of scheduled services at the airport since no evidence specifically related to the impact of scheduled services was introduced. As Mr. Molar explained in the Directors Determination, the ban on scheduled services at Centennial airport does not in anyway limit the growth of total aircraft operations. He further testified that all of the impacts addressed in the testimony of the community representatives and expert, Dr. Cohn, appear to be "largely a function of the total number of operations at the airport." (Molar Rebuttal Testimony, Para. 36.)

There is nothing in the record to support the ACPAA's total ban an scheduled service providers. As the Director's Determination found and as supported by the testimony of Mr. Barry Molar, the author of the Director's Determination and Manager of FAA's Office of Airport Compliance, and other witnesses on behalf of the FAA, the Authority failed to demonstrate that the total exclusion of scheduled Part 135 operations is either necessary to cure unsafe conditions at the airport or to ensure the airport's ability to meet civil aviation needs of the public. (Molar Testimony, Page 12.) The anecdotal information provided by the witnesses for the Greenwood Village and the Authority is not persuasive and accordingly does not justify the total prohibition of Part 135 scheduled service. Inasmuch as the Authority permits unscheduled passenger services using similar airplanes, flight patterns, making the same amount or more of noise, and does not limit the number of operations at the airport, the prohibition is unjustified and does not alleviate the problems of

which the witnesses for the Authority and the Greenwood Village complain.

In sum, despite all the testimony received in the instant record from the witnesses on behalf of Greenwood Village and the ACPAA it is not sufficient to establish that the ban on scheduled services is consistent with the authority's obligation to provide access to the airport on reasonable terms without unjust discrimination and with the prohibition on granting exclusive rights. The ban is not consistent with the proprietor's exception and is [sic] therefore exceeds the lawful authority of the Supremacy Clause of the United States Constitution. The Director properly determined that the ban on scheduled services at Centennial Airport amounted to regulation of rate, routes and service within the meaning of 49 U.S.C. 41713(b), and that the Authority's actions fall outside the scope of the proprietor's exception.

49 U.S.C. 47107(a)(1)

In view of the facts in the instant record it is my decision that the ACPAA in prohibiting Centennial Express Airlines from operating scheduled air service at Centennial violated its federal obligations regarding economic nondiscrimination as provided for under 49 U.S.C. 47107(a)(1) and in the commitments made by the ACPAA as contained in the ACPAA's grant agreements, Grant Assurance No. 22.

Essentially, 49 U.S.C. 47107(a)(1), as implemented through standard Grant Assurance No. 22, requires the airport sponsor to "make its airport available as an airport for public use on fair and reasonable terms, and

without unjust discrimination, to all types, kinds, and classes of aeronautical uses." In addition, however, the airport sponsor, the ACPAA "may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport." Assurance No. 22(h) also provides that the sponsor "may limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

The FAA argues that by banning scheduled Part 135 service, merely because it is scheduled, while permitting unscheduled Part 135 air taxi and charter operations, the APCAA [sic] is effectively discriminating against Centennial Express Airlines. In the Director's Determination, the Director found that the ACPAA "has not provided evidence of safety, efficiency or environmental concerns that would justify the restriction at this airport." (Director's Determination, page 19.) ACPAA still has not provided sufficient evidence to support its claims of adverse safety, efficiency, or environmental effects from **scheduled** air service as compared to the effects of **unscheduled** Part 135 operations on these matters.

The arguments now raised by Greenwood Village in support of the action taken by the ACPAA are merely conclusions and lack the necessary support to permit one to conclude anything other than that the ACPAA violated its Federal obligations regarding economic discrimination. Greenwood Village contends that the ACPAA has established that its prohibition of scheduled service at Centennial Airport in [sic] premised upon adverse safety,

efficiency and environmental effects from scheduled service. The issues put forward by the ACPAA and Greenwood Village are essentially: (1) Centennial Express Airlines proposed service includes more than just one six-seat Beechcraft King Air and accordingly, the Director's Determination that the proposed Centennial Express Airline scheduled service would have an insignificant impact on the character of the airport is erroneous; (2) CEA's scheduled service would create ground congestion at the Airport; (3) CEA's operation would necessitate substantial changes to the airport's infrastructure, including parking, passenger terminal facilities, food service facilities, and baggage handling; (4) Centennial Airport is approaching its maximum operational capacity of 525,000 annual operations; (5) Centennial Airport is unable to meet the NTSB recommended response time for fire safety; and, (7) the influx of scheduled services will increase operations, including the mixing of small, low-speed private aircraft flown by student pilots and large, high-speed commercial planes in an airport and thereby creating safety concerns.

The Director's Determination found that: (1) the scheduled Part 135 operations were of no moment since the Authority permits operation of the same aircraft in non-scheduled Part 135 commercial service, (2) FAA operating rules and air traffic control would assure safe operation at any level of activity, (3) the ban on scheduled services does not limit total operations, and accordingly does not address the problems of congestion, (4) with respect to environmental issues the ACPAA must show that the noise or environmental problem actually exists, and second, that the restriction in question is rationally related to

the problem and; (5) the lack of a public passenger terminal with baggage handling facilities is no basis to ban scheduled service, since on demand air taxi operations have been providing services without these facilities.

Neither the ACPAA nor Greenwood Village provided sufficient evidence to support the adverse safety and efficiency resulting from scheduled services. By way of example, there is no credible rationale to support the ACPAA's claim that banning scheduled service in light of the NTSB recommendation for a 3 minute response time for Part 139 airports for scheduled services is required as a safety condition in view of the fact that the Authority has not banned nonscheduled service at Centennial Airport using the same type of aircraft. With respect to the increased operations at the airport, there is no evidence that such increased operations would result in safely [sic] problems. The ACPAA could, as testified to by Mr. Molar, institute hourly caps on the number of operations or impose limits on the non-stop distance that flights can operate.

The ACPAA's prohibition against scheduled service is in violation of 49 U.S.C. 47107(a)(1). The ban on the scheduled services, in light of the testimony of witnesses for Greenwood Village, the ACAPP [sic] and the FAA does not support the conclusion that such action is necessary for the safe and efficient operation of airport. Neither ACPAA nor Greenwood Village has produced sufficient evidence to support their positions.

49 U.S.C. 40103(e) and 47107(a)(4)

The Director's Determination found that the ACPAA by banning scheduled service at Centennial Airport violated 49 U.S.C. 40103(e) and 47101(a)(4) as well as Grant Assurance 23. Section 40103(e) provides in relevant part that there should be no exclusive right to use any landing or air navigation facility upon which Federal funds have been expended. Section 47101(a)(4), in pertinent part, also establishes that "there will be no exclusion right for the use of the airport by any person providing, on intending [sic] to public." In addition, Assurance 23, (to which the ACPAA and all Airport Improvement Program grant recipients are bound) states in pertinent part that the grant recipient "will permit no exclusive right for the use of the airport by any person providing, or intending to provide aeronautical services to the public." The ACPAA has permitted commercial entities to conduct Part 135 unscheduled operations without restriction while it has denied Centennial Express Airlines use of the aeronautical services of Centennial Airport.

It is undisputed that the ACPAA permits unscheduled Part 135 operations the right to provide aeronautical services at Centennial Airport while excluding scheduled Part 135 operators. In fact, the ACPAA permits air carrier operations to conduct on-demand taxi operations. (Molar Testimony, page 17.) Argument by the ACPAA and Greenwood Village that suggests scheduled and unscheduled services are different is unsupported by objective evidence and does not support the ACPAA's policy. To allow the ACPAA to exclude one class of Part 135 service, scheduled operations, while permitting on-demand services, when there is no significant operational

difference between the two is inappropriate and in violation of 49 U.S.C. 40103(e) and 47101(a)(4) as well as Grant Assurance 23. As discussed earlier, there is no safety or environmental concerns to support such exclusive right. Moreover, as set forth in the Director's Determination, the ACPAA has imposed a moratorium on accepting new applications for scheduled service operations. (Director's Determination, page 27.) The ACPAA has, in view of the record in this proceeding taken no steps to lift this moratorian [sic] which has now been in effect for almost 5 years. This delay in processing an application or request for entry to a federally funded airport can in itself be construed as a denial of access, *see British Airways Board v. The Port Authority of New York and New Jersey*, 564 F.2d 1002 (1997).

Regional Planning

The ACPAA and Greenwood Village have taken the position that since the Denver Regional Counsel of Governments ("DRCOG") has been involved in planning regional aviation systems, the designation of Centennial Airport as a reliever airport this involvement and designation should be treated as the functional equivalent of a multi-airport system owner, and permit the banning of scheduled Part 135 carriers. FAA Order 5190.6A states in pertinent part, as follows:

> Where the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system under the same ownership and servicing the same community for use by a particular class on

> [sic] classes of aircraft. The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the owner's control and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity.

Greenwood Village assets [sic] that there is no rational basis for not extending this flexibility, which is now afforded to multiple airports under joint ownership, to the ACPAA's situation.

The ACPAA, however, cannot meet any of the conditions necessary to establish that it is a multi-airport system owner. (1) Centennial Airport is not at or approaching its operational capacity. (2) Neither the DRCOG nor the ACPAA can assure that all classes of aeronautical needs in the Denver Regional Airport system can be fully accommodated, without unreasonable penalties to any one class. (3) The restriction is not fully supported as beneficial to overall aviation system capacity. (4) Evidence was not provided that either DRCOG or ACPAA are the single legal owner of multiple airports in the Centennial area.

In addition, Mr. Molar testified that: "The FAA's support of the regional planning process is based on among other things, the assumption that the airports discussed in the plan will adhere to all applicable AIP assurances. There is no limiting language in the assurance to link the obligation to provide access to the "types, kinds, or classes" of air carrier service that are consistent with the airport's

classification." (Molar Rebuttal, Para.16.) More importantly, the DRCOG has no legal operational control over the airports in the region and therefore, cannot assure that all classes of users can be accommodated in the Denver regional area.

The FAA's policy concerning multi-airport owners is reasonably based and it is clear that a regional plan cannot as a matter of law take precedence over the grant assurances. Accordingly, ACPAA's restriction on scheduled services cannot be justified on this ground.

Standing

Greenwood Village argues that the actions filed by Centennial Express Airlines and Thomas Kehmeier should be dismissed for lack of standing. Greenwood Village contends that neither Mr. Kehmeier nor Centennial Airline meets the standing requirement as set forth at 14 C.F.R. 16.23(a). This regulation provides that only persons directly and substantially affected by any noncompliance with a grant assurance may file a complaint with the Administrator under 14 C.F.R. 16. Section 16.23(b)(4) further requires the complainants to describe how directly and substantially the entities were affected by the things done or omitted to be done by the respondents.

Greenwood Village asserts two bases for its argument that Centennial Express Airlines lacks standing: (1) Centennial Express Airlines' subsidiary, Golden Eagle Charters, does not presently hold a Part 135 air carrier certificate authorizing it to offer scheduled passenger service at Centennial Airport; and (2) Centennial Express Airlines had been administratively dissolved for failure

to file its 1997 corporate report. Thus, Greenwood Village argues that Centennial Express Airlines did not exist at the time that Mr. Andrews filed the Part 16 Complaint in this matter.

With respect to Mr. Kehmeier, Greenwood Village asserts that Mr. Kehmeier's move from the Denver metropolitan area sometime in 1996 would deny him the benefit he alleged in his Part 13 Complaint. It was represented by Mr. Kehmeier that scheduled services at Centennial would be more convenient than at the Denver's new airport.

The FAA in response to these assertions contends that both Mr. Kehmeier and Centennial Express Airlines meet the requirements for filing complaints under 14 CFR Part 13.5(a). Part 13.5(a) contains a less rigorous standing requirement than the one contained in Part 16. Part 13.5(a) permits any person to file a complaint "with respect to anything done by any person in contravention of any provision of any Act or regulation or order issued under it, as to matters within the jurisdiction of the Administrator." The two Part 13 dockets were consolidated by the agency "to avoid duplicative proceedings and assure that the Part 16 complaint is addressed within the time requirements of that regulation. (Director's Determination at Page 18).

The FAA apparently does not to [sic] take issue with Greenwood Village's contention that the parties must maintain standing at all times throughout a case for an adjudicatory body to retain jurisdiction. FAA contends that under Part 13, with its lesser standing requirements, the dissolution of Centennial Express Airlines and the

voluntary surrender of the Part 135 certificate of its subsidiary Golden Eagle Charters had no effect on Centennial Express Airlines' standing under Part 13.5. Since the standing requirement under part 13.5 is significantly less than that which is required under Part 16, the Government contends that requiring a party to adhere to the Part 16 standing requirement would amount to a violation of due process.

With respect to Mr. Kehmeier, the FAA simply contends that he has established and maintained his Part 13 complaint as a private citizen. His move outside the Denver area is not relevant since Mr. Kehmeier can still show that he was directly and substantially affected by the Authority's prohibition on scheduled service and that he still has an economic interest in lower costs for scheduled passenger service operating from Centennial Airport.

Whether or not Centennial Express Airlines still has a Part 135 certificate or is a corporation under Colorado law is not relevant to this proceeding. Whether or not Mr. Kehmeier is presently a resident of Denver, Colorado is also equally not relevant to these proceedings. At the time their respective Part 13 Complaints were filed with the FAA each satisfied the "standing" requirements which were then in effect. Each complaint was filed by a "person" alleging a violation of an Act, regulation or order within the jurisdiction of the Administrator. To apply the stricter Part 16 requirements for standing and pleading content to complaints already filed and accepted would result in a violation of both Mr. Kehmeier and Centennial Express Airline's right to fundamental due process.

Furthermore, with respect to these proceedings Centennial Airport has continued since 1994 to prohibit scheduled passenger service. The FAA under Part 16.101 has the authority to investigate on its own initiative "any matter within the applicability of this part" without having received a complaint. This matter, therefore, would still proceed, regardless of the standing of these particular Complainants.

I hold that the Complainants have maintained the necessary standing requirements associated with their Part 13 Complaints and that requirements regarding standing expressed in Part 16 are not applicable.

49 U.S.C. 44706

Both the ACPAA and Greenwood Village have taken the position that Subsections (a) and (b) of 49 U.S.C. 44706 are self-executing and took effect upon passage of the of the Federal Aviation Administration Reauthorization Act of 1996, Pub. L. No. 104-264, codified at 49 U.S.C. 44101, *et al.* In sum, the statute, which regards the certification of small airports, authorizes the FAA to issue airport operating certificates for airports which serve any scheduled or unscheduled passenger operation of an air carrier that is conducted with an aircraft having a seating capacity of more than 30 passengers. According to the Director's Determination, the FAA has initiated a rulemaking project to amend Part 139 to include certification of these airports. The FAA has taken the position that the statute requires that prior to implementation, that any regulation

which establishes the terms for certification of the commuter airports shall first be submitted for Congressional review prior to the regulations implementation.

In sum, the statute, in salient part, provides as follows: Subsection (a)(2) extends the requirement of Part 139 certification that formally applied only to airports serving air carriers operating aircraft designed for 30 or more. Subsection (b) of Section 44706, permits the FAA Administrator to set forth the terms of the airport operating certificate issued under this section unless it is determined not to be in the public interest. Subsection (d) directs the FAA Administrator to identify and consider a reasonable number of regulatory alternatives and from such alternatives, select the least costly "most effective or least burdensome alternative that will provide comparable safety at airports described in subsections (a)(1) and (a)(2). Subsection (e), entitled, "Effective Date" provides that the FAA to submit to Congress a report on the economic impact of any regulation establishing the terms required by subsection (b) for airports covered under subsection (a)(2) before such regulations can take effect. Finally, subsection (f) provides very clearly that nothing in the statute "may be construed as requiring any person to obtain an airport operating certificate if such person does not desire to operate an airport" for 30 or more passengers as set forth in subsection (a)(2) of the statute.

There is no argument amongst the parties that subsection (f) is anything but self-executing. Mr. Molar has stated that the FAA does not dispute the clear meaning of subparagraph (f) or the current effectiveness of subparagraph (f). In sum, the FAA cannot require the ACPAA or

any airport operator to obtain an airport operating certificate under Part 139 against its will. According to Mr. Molar, subsection (f) is consistent with FAA policy that has been in place since 1989 (Order 5190.6A, October 2, 1989). The Order provides that if an airport refuses to apply for a FAR Part 139 Airport Operating certificate when there is clear evidence that an air carrier desires to serve the location, this fact alone does not indicate a violation of the grant assurances. (Molar Rebuttal Testimony, Para. 27.)

It is clear that in analyzing the construction of a statute that the starting point for interpreting a statute is the language of the statute itself and that in trying to determine whether Congress intended the statute to be self executing, courts would look first to the plain language of the statute. *Albernaz v. United States* 67 L.Ed 2d 275, 450 U.S. 333, 101 S Ct 1137 (1981) and *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia Inc.* 775 F. Supp 1040, (S.D.Ga 1990), reconsideration 755 F.Supp. 1055 (S.D. Ga. 1990). It is my opinion that the interpretation which the Authority and Greenwood Village adopt is without any support. Subsection (a) and (b) are not self-executing.

The statute clearly requires the Administrator to identify and consider all regulatory alternatives and that prior to any regulation being effective to provide an economic impact report regarding the regulation to Congress. Clearly, Congress has stated its desire to review the implementing regulation prior to its taking effect.

Both the legislative history (Federal Aviation Authorization Act of 1996, House Conference Repor [sic] (H.R.

Conf. Rep. No. 848, 104th Cong. 2d Sess. 95 (1996) behind the statute and the additional language contained in the Reauthorization Act of 1998 make it clear that the subsections in question are not self-executing. The Reauthorization Act of 1998 states in pertinent part:

> Not later than 180 days after the date of enactment of this Act, the Administrator shall issue a notice of proposed rulemaking on implementing section 44706(a)(2) relating to issuance of airport operating certificates for small scheduled passenger air carrier operations.

This clearly indicates and supports the FAA's contention that other than subsection (f) the remainder of the statute is not self-executing. It is inconceivable that Congress would require the FAA to undertake a formal rule making process in implementing 44706(a)(2) if Congress intended for the statute to be self-executing.

The distinction which the ACPAA and Greenwood Village attempt to draw is at odds with the plain language of the statute.

Conclusion

For the reasons set forth above, it is my decision that the evidence and applicable law support the Director's Determination.

/s/ Anthony L. Washington
Anthony L. Washington
Hearing Officer

December 23, 1998

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

CENTENNIAL EXPRESS AIRLINES and GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	Docket No. 16-98-05
THOMAS KEHMEIER v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	Docket No. 13-94-25
CENTENNIAL EXPRESS AIRLINES and GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY	Docket No. 13-95-03

Director's Determination

(Filed 8/21/98)

INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on the formal complaint filed in accordance

with our Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), 14 C.F.R. Part 16.

Centennial Express Airlines (CEA) has filed a formal complaint pursuant to the FAA Rules of Practice against the Arapahoe County Public Airport Authority (ACPAA), owner and operator of the Centennial Airport, alleging that the Airport Authority has unlawfully prohibited scheduled passenger service at Centennial Airport under FAR Part 135, with aircraft having a maximum capacity of 30 seats and under.

The Airport: Centennial Airport (APA) is a public-use airport located approximately 14 miles southeast of Denver, Colorado. The airport is owned and operated by the Arapahoe County Public Airport Authority (ACPAA). In 1996 there were 635 based aircraft and 402,735 annual operations at the airport. [FAA Exhibit 1, Item 1] APA does not hold an airport operating certificate issued under 14 CFR Part 139, Certification and Operations: Land Airports Serving Certain Air Carriers.

The planning and development of the airport has been financed, in part, with funds provided by the FAA under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. § 47101, *et seq.* [FAA Exhibit 1, Item 2][1] Since 1983, the ACPAA has entered into numerous AIP grant agreements with the FAA and has received a total of $18,625,636 in federal airport development assistance. In 1996, the ACPAA received its most recent AIP grant in the amount of $898,733 to rehabilitate taxiway

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[1] FAA Exhibit 1, Item 2, Grant History

lighting and runway/taxiway signs. FAA Exhibit 1, Item 1][2]

Colorado State Litigation

On December 20, 1994, CEA, in accordance with its Air Carrier Certificate, began scheduled air carrier operations with one 6 passenger Beechcraft aircraft. CEA based its operation at Centennial Airport in building space it subleased from Colorado Air Center, Inc. (now known as Denver JetCenter).

On December 22, 1994, the District Court, County of Arapahoe, State of Colorado, issued a temporary restraining order prohibiting Centennial Express Airlines from providing scheduled service at Centennial Airport. [FAA Exhibit 1, Item 5, Permanent Injunction Order, page 1]

On January 10, 1995, a permanent injunction was issued by the District Court, County of Arapahoe, State of Colorado. [FAA Exhibit 1, Item 4, Tab A, Permanent Injunction Order]

On July 18, 1995, CEA appealed the Permanent Injunction Order through the Court of Appeals, State of Colorado, Case No. 95 CA 307. [FAA Exhibit 1, Item 7, Exhibit H]

On December 12, 1996, the Colorado Court of Appeals reversed the permanent injunction entered in favor of the ACPAA. *Appeal from the District Court of Arapahoe County, 942 P.2d 1270 Colorado App. 1996* [FAA Exhibit 1, Item 4, attachment A]

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[2] FAA Exhibit 1, Item 1, Airport Master Record (5010)

On April 13, 1998, the Supreme Court, State of Colorado issued its decision on review of the *Court of Appeals decision in Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc. No. 97-SC-123.* The Supreme Court, with two justices dissenting and one abstaining, ruled that the Court of Appeals erred in reversing the permanent injunction entered in favor of the ACPAA.

The Court declined to defer to the FAA's primary jurisdiction over the matter, finding that the issue was not Federally preempted under the 49 U.S.C. 41713(b)(1) provision prohibiting state or local regulation of "price, route or service of an air carrier" but rather fell within the provisions of § 41713(b)(3), proprietor exception.

The majority also held that the ban did not violate FAA grant assurances requiring the sponsor to "make its airport available as an airport for public use on fair and reasonable terms without unjust discrimination, to all types, kinds and classes of aeronautical users." Furthermore, the majority said that "the authority's ban on scheduled service is necessary to ensure safe operation of the airport . . . since increased congestion is sure to have an impact on safety." [FAA Exhibit 1, item 5]

As an expert administrative agency, the FAA (along with the Secretary of Transportation (Secretary) in connection with certain economic issues) is charged with interpreting and implementing the Federal aviation statutes, including the airport grant program and the program for the transfer of surplus property for airport purposes. Moreover, Federal courts, including the Supreme Court, have recognized the unique expertise of the FAA and the Secretary

in interpreting the Federal statutory provisions at issue. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989); *Interface Group, Inc. v. Massachusetts Port Authority* (816 F.2d 9 (1st Cir. 1987); *and, Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S. 355 (1994)*. The FAA is not bound to follow the reasoning of the Colorado Supreme Court's decision and has conducted a *de novo* review of the matters raised in the complaint.

Issues

The complainants present the following issues for decision:

- Whether the ACPAA, by prohibiting Centennial Express from operating scheduled air service at APA, is violating its federal obligations regarding economic nondiscrimination as set forth in 49 U.S.C. § 47107(a)(1) and in the Authority's grant agreements.
- Whether the ACPAA, by prohibiting Centennial Express from operating scheduled air service at APA, is violating its federal obligations regarding exclusive rights as set forth in 49 U.S.C. § 40103(e), 47107(a)(4), and in its grant agreements.
- Whether the ACPAA, by prohibiting Centennial Express from operating scheduled air service at APA, is violating provisions of Federal law prohibiting state and local regulation of air carrier prices, routes and service as set forth in 49 U.S.C. § 41713(b)(1), and thereby exceeding its lawful authority under the Supremacy Clause of the United States Constitution.

Under the specific circumstances at Centennial Airport, discussed below, and based on the evidence of record, we

find that the ACPAA, by denying access to Centennial Express Airlines, Inc., is in non-compliance with the provisions of 49 U.S.C. 47107(a)(1) regarding economic nondiscrimination; with the provisions regarding exclusive rights as set forth in 49 U.S.C. Sections 47107(a)(4) and 40103(e); with 49 U.S.C. 41713(b)(1), regarding federal preemption over regulations relating to air carrier prices, routes, and services; and with the Authority's Federal grant agreements. By virtue of the violation of section 41713(b)(1), the ACPAA has exceeded its authority, as a state or local government, under the Supremacy Clause of the United States Constitution.

Our decision in this matter is based on the applicable law and FAA policy, review of the arguments and supporting documentation submitted by the parties, and the administrative record in this proceeding. [FAA Exhibit 1].

APPLICABLE LAW AND POLICY

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C. Section 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by grant assurance or by restrictive covenants in property

deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions.

Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design; construction, operation and maintenance as well as ensuring the public reasonable access to the airport. Pursuant to 49 USC § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their sponsor assurances.

FAA Order 5190.6A, Airport Compliance Requirements, (hereinafter Order) provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to federally obligated airport owners' compliance with their sponsor assurances.

The Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under the AAIA, the Secretary of Transportation receives certain assurances from the airport sponsor.

The AAIA, 49 USC § 47101(a), *et seq.*, sets forth assurances to which an airport sponsor receiving Federal financial assistance must agree as a condition precedent to receipt of such assistance. These sponsorship requirements are included in every airport improvement grant agreement. Upon acceptance of an AIP grant by an airport sponsor, the assurances become a binding obligation upon the airport sponsor.

Enforcement of Airport Sponsor Assurances

Enforcement procedures regarding airport compliance matters are set forth in the FAA Rules of Practice for Federally-Assisted Airport Proceedings, 14 CFR Part 16. These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and were effective on December 16, 1996. For complaints filed before that date, the enforcement procedures are set forth in 14 CFR Part 13.

The FAA Airport Compliance Program

The FAA discharges its responsibility for ensuring airport sponsor compliance with Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations, which an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation. The Airport Compliance Program does not control or direct the operation of airports; rather, it monitors the administration of the valuable rights pledged by airport sponsors

to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served.

FAA Order 5190.6A sets forth policies and procedures for the FAA Airport Compliance Program. The Order is not regulatory and is not controlling with regard to airport sponsor conduct; rather it establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition for the grant of Federal funds or the conveyance of Federal property for airport purposes. The Order, *inter alia*, analyzes the various obligations set forth in the standard airport sponsor assurances; addresses the nature of those assurances; addresses the application of these assurances in the operation of public-use airports; and facilitates interpretation of the assurances by FAA personnel.

Airport Owner Rights and Responsibilities

Assurance 5, "Preserving Rights and Powers," of the prescribed sponsor assurances implements the provisions of the AAIA, 49 USC Section 47107(a), et seq., and requires, in pertinent part, that the sponsor of a federally obligated airport " . . . will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act

promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."

In addition to obligating the airport sponsor to preserve its rights and powers to carry out all grant agreement requirements, this assurance also places certain obligations on the sponsor regarding land upon which Federal funds have been spent, including the operation and maintenance of other airports managed by the sponsor.

FAA Order 5190.6A, Airport Compliance Requirements, (Order) describes the responsibilities under Assurance 5 assumed by the owners of public use airports developed with Federal assistance. Among these is the responsibility to enforce adequate rules, regulations, or ordinances as are necessary to ensure the safe and efficient operation of the airport.

See Order, Sec. 4-7 and 4-8.

Use on Reasonable and Not Unjustly Discriminatory Terms

Assurance 22, of the prescribed sponsor assurances, "economic nondiscrimination," implements the provisions of 49 U.S.C. 47107(a)(1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport " . . . will make its airport available as an airport for public use on fair and reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." Assurance 22(a)

" . . . may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the

airport as may be necessary for the safe and efficient operation of the airport." Assurance 22(h)

" . . . may . . . limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public." Assurance 22(i)

Subsection (h) qualifies subsection (a) and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions which would be detrimental to the civil aviation needs of the public.

FAA Order 5190.6A describes the responsibilities under Assurance 22 assumed by the owners of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. See Order, Sec. 4-14(a)(2) and 3-1.

The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

See Order, Sec. 3-8(a).

The owner of any airport developed with Federal grant assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. See Order, Sec. 4-13(a).

The Prohibition Against Exclusive Rights

Section 308(a) of the FAAct, 49 USC § 40103(e), provides, in relevant part, that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."

Section 511(a)(2) of the AAIA, 49 USC § 47107(a)(4), similarly provides, in pertinent part, that "there will be no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public."

Assurance 23, of the prescribed sponsor assurances, "Exclusive Rights," requires, in pertinent part, that the sponsor of a federally obligated airport " . . . will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public . . . and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Improvement Act of 1982."

In FAA Order 5190.1 A, Exclusive Rights, the FAA published its exclusive rights policy and broadly identified aeronautical activities (any activity which involves, makes possible, or is required for the operation of aircraft, or which contributes to or is required for the safety of such operations) as subject to the statutory prohibition against exclusive rights. While public use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, we have taken the position that the application of any unreasonable requirement or a standard that is applied in an

unjustly discriminatory manner may constitute a constructive grant of an exclusive right. See FAA Order 5190.1 A, Para. 11.c.

FAA Order 5190.6A provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. See Order, Ch. 3.

Minimum Standards

The FAA encourages airport management, as a matter of prudence, to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must, however, be fair, reasonable and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. See, Order @ 3-12.

While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement or any requirement which is applied in an unjustly discriminatory manner could constitute the grant of an exclusive right. A standard which a tenant operator is required to meet must be uniformly applicable to all operators seeking the same franchise privileges. See Order @ 3-17[c]

The FAA ordinarily makes an official determination regarding the relevance and/or reasonableness of the minimum standards only when the effect of a standard denies access to a public-use airport. Such determination

is limited to a judgment as to whether failure to meet the qualifications of the standard is a reasonable basis for such a denial, or whether the standard results in an attempt to create an exclusive right. See Order @ 3-17(b)

The airport owner may quite properly increase the minimum standards from time to time in order to ensure a higher quality of service to the public. Manipulating the standards solely to protect the interest of an existing tenant, or tenants, however, is unacceptable. See Order @ 3-17(c).

Federal Preemption of Authority Over Air Carrier Service

49 U.S.C. § 41713 prohibits a state or local government from regulating the rates, routes or services of an air carrier authorized to provide air transportation. 49 U.S.C. § 41713(b)(1) provides, in relevant part, that

> "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under [49 U.S.C. §§ 41101 through 42112]."

However, 49 U.S.C. § 41713(b)(3) establishes an exception to this general prohibition by providing, in pertinent part, that

> "this subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights."

Air Taxi Operations and Commercial Air Service

49 U.S.C. § 44101, *et seq.*, authorizes the FAA, among other things, to establish rules and regulations for the safe operation of aircraft. Federal Aviation Regulations (FAR) Part 135, *Air Taxi Operators and Commercial Operators*, in pertinent part, prescribes rules governing the carriage in air commerce of persons or property for compensation or hire as a commercial operator . . . "in common carriage operations solely between points entirely within any state of the United States in aircraft having a maximum seating capacity of 30 seats or less.[3]" 14 CFR Part 135 also provides, in pertinent part, "that no person may operate an aircraft under this part without, or in violation of, an air taxi/commercial operator . . . operating certificate and appropriate operations specifications issued under this part, or, for operations with large aircraft having a maximum passenger seating configuration . . . of more than 30 seats . . . without, or in violation of, appropriate operations specifications issued under [FAR] Part 121 *[Certification and Operations: Domestic, Flag, and Supplemental Air Carriers and Commercial Operators of Large Aircraft].*[4]"

In addition, 14 CFR § 121.590 prohibits air carriers and air carrier pilots from operating an aircraft with 31 or more seats, into a land airport in any State of the United States unless the airport is certificated under 14 CFR Part 139.

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[3] FAR Section 135.1(a)(3).

[4] FAR Section 135.5.

Commuter Fitness Requirement

The FAAct, 49 USC § 41101 prohibits any person from engaging in air transportation, without a certificate authorizing air transportation issued by the Department of Transportation, unless otherwise authorized by Federal statute or regulation. In turn, 49 USC § 40109(f) authorizes passenger air transportation with aircraft having a maximum capacity of 55 seats without regard to the requirements of section 41101. Section 40109(f) also authorizes the Secretary of Transportation to raise the maximum seating capacity for aircraft operating under this statutory provision.

The Department of Transportation has adopted 14 CFR Part 298 "exemptions for Air Taxi and Commuter Air Carrier Operations" to implement the provisions of section 40109(f). Part 298 defines "commuter air carrier" as "an air taxi operator that carries passengers on at least five round trips per week on at least one route according to a public schedule." 14 CFR § 298.2(e). An air taxi operator in turn is an air carrier that does not operate aircraft with a seating capacity of more than 60 seats. 14 CFR § 298.2(a) and 14 CFR § 298.3.

In 14 CFR Part 204, "Data to Support Fitness Determinations," the Department of Transportation has established data filing requirements support applications to conduct operations as a commuter air carrier. The effect of Part 204 is to require air carriers proposing to conduct commuter air carrier operations within the meaning of Part 298 to be found fit by the Department before commencing their operations. Based on the definition of commuter air carrier, this fitness requirement does not apply to air taxi

operators conducting no more than four scheduled flights per week on any route.

Airport Operating Certificates

49 U.S.C. § 44706 authorizes the FAA to issue airport operating certificates. Federal Aviation Regulations (FAR) Part 139, *Certification and Operations: Land Airports Serving Scheduled Air Carriers Operating Large Aircraft* (14 CFR Part 139), provides for the issuance of such airport operating certificates. This part prescribes rules governing the certification and operation of airports which serve any scheduled or unscheduled passenger operation of an air carrier that is conducted with an aircraft having a seating capacity of more than 30 passengers.

Section 404 of the Federal Aviation Authorization Act of 1996, amended to 49 U.S.C. § 44706, authorizes the FAA to certify airports, except those located in Alaska, that serve scheduled air carrier operations operating aircraft with 10 to 30 seats.

The FAA has initiated a rulemaking project to amend Part 139 to include certification of these airports. A Notice of Proposed Rulemaking (NPRM) is scheduled to be published in early 1999. Upon the publication of the NPRM, the public will be provided ample opportunity to comment on the proposal and all comments received will be considered before the FAA takes action on the proposal. The statute requires that any regulation related to the certification of commuter airports shall undergo Congressional review prior to implementation. If the final rule is adopted, that rule would prohibit scheduled operations at the airport by aircraft having 10 or more passenger

seats unless the airport holds a Part 139 operating certificate. The FAA will not require ACPAA to obtain a Part 139 certificate.

BACKGROUND

Part 13 Proceedings

A. Docket No. 13-94-25, Thomas Kehmeier v. ACPAA

On August 7, 1994, formal complaint No. 13-94-25 was filed by Thomas Kehmeier against the Arapahoe County Public Airport Authority, in accordance with the FAA Investigative and Enforcement Procedures (14 CFR Section 13.5).

Mr. Kehmeier, a private citizen, alleged that banning scheduled service at Centennial Airport violated provisions of the ACPAA's grant assurances.

On February 2, 1995, the Arapahoe County Public Airport Authority responded to the complaint by Mr. Thomas Kehmeier denying the allegations and requesting that the FAA dismiss the complaint, or, in the alternative, decline to institute an investigation as provided for in Part 13.5(h). [FAA Exhibit 1, Item 4, Tab F]

B. Docket No 13-95-03, Centennial Express Airlines v. ACPAA

On June 18, 1986, the FAA Denver Flight Standards District Office, issued an Air Carrier Certificate to Golden Eagle Charters, Inc., d/b/a. Centennial Express Airlines, 7625 South Peoria Street, Englewood, CO. 80112. On December 20, 1994, this Certificate was reissued with the

following language. [FAA Exhibit 1, Item 3 Ex. A. "Copy of Air Carrier Certificate"]

> "Centennial Express Airways, Inc. has met the requirements of the Federal Aviation Act of 1958, as amended, and the rules, regulations, and standards prescribed thereunder for the issuance of this certificate and is hereby authorized to operate as an air carrier and conduct common carriage operations in accordance with said Act and the rules, regulation, and standards prescribed thereunder and the terms, conditions and limitations contained in the approved operations specifications."

Beginning in 1985, CEA established contact with the Arapahoe County Airport Authority (ACPAA) and/or the airport manager regarding the startup of scheduled 14 CFR Part 135 passenger service at Centennial Airport. [FAA Exhibit 1, Item 3, page 3]

On February 20, 1989, in the *Centennial Aerogram*, a newsletter published by the ACPAA, the Authority stated its position regarding Part 135 aeronautical activities. The Authority stated:

> "It should be recognized that commercial service has always existed at Centennial in the form of Part 135 charter/air taxi certification, which permits "for hire" passenger and freight service, whether scheduled or unscheduled. Such activity may not be prohibited but is limited to aircraft with 30 seats or less." [FAA Exhibit 1, Correspondence C-6]

In the *Centennial Aerogram* of October 3, 1989, the ACPAA published the following statement:

> "No scheduled air carrier, either large or small, has applied to the Authority to operate at the airport. Should any apply, the Authority will consider only the smaller, regional air service applications. No action will be taken by the Authority to consider such applications, however, without extensive community input and public hearing." [FAA Exhibit 1, Correspondence C-6 "Aerogram", page 3]

On December 12, 1991, a letter was sent to the ACPAA from CEA asking the airport to set standards which would allow CEA to operate. CEA alleges that the ACPAA notified them that it was revising its airport policy statement and that the new policy statement would need to be completed prior to the enactment of minimum standards for scheduled passenger service under Part 135. [FAA Exhibit 1, Item 3, page 3"]

On March 12, 1992, the Airport adopted and promulgated a policy statement, which states that:

> "The Authority reaffirms the original intent of the airport to service the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal Aviation Regulations Part 135/Operations Specifications 135 (30 or fewer seats.) Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the application minimum standards." [FAA Exhibit 1, Correspondence C-5, "Centennial Airport Policy Statement"]

In the May 1, 1992 *Centennial Aerogram*, (which included the Report of Airport Authority Board Meetings of March 12 and April 23rd) published and disseminated to the

public the same policy statement. [FAA Exhibit 1, Correspondence C-5,]

On April 8, 1993, the ACPAA adopted minimum standards for Part 135. At the same time, the ACPAA also adopted a *Resolution* that states in pertinent part that:

> "There is hereby imposed a moratorium on the review or consideration of any applications for Scheduled Air Carrier Operations filed under the Airport's Minimum Standards for Commercial Aeronautical Activities and this moratorium shall be in effect until lifted by further order of the Authority or by final court order."

In the same document, the ACPAA went on to state that:

> "The Authority Board hereby directs the attorneys for the Authority to commence legal action on behalf of the Authority and in conjunction with the Arapahoe County Attorney's Office to determine whether Scheduled Air Carrier Operations are allowed to operate at the Airport and/or whether the Authority Board may prohibit Scheduled Air Carrier Operations at the Airport." [FAA Exhibit 1, Correspondence C-1]

On July 21, 1993, the ACPAA sent a letter to the United States Department of Transportation (USDOT) requesting policy guidance on the relationship between Centennial Express' proposal and commitments made in exchange for Federal airport development grants. The Airport Authority argued that federal airport grant obligations should not be construed to require airports to accept commuter service. The Airport Authority provided voluminous supporting documentation with its letter. [FAA Exhibit 1, Correspondence C-5]

In the course of preparing a response, the FAA met with officials from Arapaho County and the City of Denver, heard directly from CEA, and received substantial amounts of correspondence from supporters and opponents of the proposed air service.

The FAA conducted a comprehensive review of the material provided by the airport Authority, Centennial Express, and supporters and opponents of the proposed air service and provided policy guidance to the Airport Authority on December 23, 1994. [FAA Exhibit 1, Correspondence, C-11]

In August 9, 1993, a letter was received by Patrick V. Murphy, Deputy Assistant Secretary for Policy and International Affairs and Leonard E. Mudd, Director, Office of Airport Safety and Standards from the law firm of Brownstein, Hyatt, Farber & Strickland, P.C,. (The intent of the letter was to comment directly about the July 21, 1993 letter to the DOT from the ACPAA. Interest from this firm had previously been indicated in letters dated 6/28/93 and 8/4/93 and the 8/9/93 letter was supportive of CEA's proposal. [FAA Exhibit 1, Correspondence C-6]

On September 8, 1994, the ACPAA adopted an airport policy statement/minimum standards banning any scheduled passenger service. The policy stated in part that: "Under no circumstances shall the Airport purpose include scheduled air carrier service." [FAA Exhibit 1, Item 6,]

On December 23, 1994, DOT responded to the July 21, 1993 letter from the ACPAA by stating that the ACPAA has taken numerous AIP grants over the years and has a

continuing obligation to comply with the grant assurances based on current FAA policy. The letter in which the DOT advised the ACPAA of the DOT's policy review stated that "The issue that this raises is whether the Department should change its policy to extend the flexibility now afforded to multiple airports under joint ownership to individually-owned multiple airports which are planned and operated under a regional agreement." The letter also advised that "in addressing similar cases in the past, FAA has found it arbitrary to exclude any particular class of service due to factors that are not reasonably related to the impacts of the Service." The DOT went on to conclude that the ACPAA had not proved that the number of passengers or operations at Centennial would warrant a ban on scheduled service.

DOT also indicated that unless ACPAA obtains an airport operating certificate under Part 139, scheduled passenger operations at Centennial Airport would be limited to aircraft with 30 or fewer seats. The DOT also stated that CEA could not serve any two points with five or more scheduled round trips per week without additional certification from DOT. [FAA Exhibit 1, Correspondence C-11]

The letter went on to state that:

> "separate from the matter of the airport's obligations under the grant assurances, your letter also raises a policy issue relating to how to harmonize several important goals . . . "

Additionally, the letter stated:

> "The issue that this raises is whether the Department should change its policy to extend the flexibility now afforded to multiple owners

> under joint ownership to individually-owned multiple airports which are planned and operated under a regional agreement. Therefore, we will be initiating early next year a process to obtain a full range of views on this issue."

However, the letter also stated that "[c]urrently, existing policy on airport access must be complied with. DOT initiated the process by publishing a Notice of Proposed Policy (NPP) (Policy Encouraging Metropolitan Planning Organizations and Airport Operators to Cooperate in Transportation Planning) on January 28, 1997, (62 FR 4091). Docket No. OST-97-2085 was established to receive comments. The focus of the NPP is regional planning of airports and improved integration of airport planning with overall regional transportation planning. The NPP did not propose to authorize a single sponsor to enter into agreements with other airport sponsors to allocate traffic among regional airports.

Sublease with Colorado Jet Center:

In 1979, ACPAA, pursuant to its proprietary rights as owner of the Airport, entered into a lease with Colorado Jet Center (now known as the Denver Jet Center). Paragraph 5B provides as follows:

> "Operations by Lessee. Lessee shall have the exclusive right at the Airport, to use and occupy the leased premises, in the areas as depicted on Exhibit A, for any one or more general aviation and related uses and any one or more purposes customarily related and incidental to the conduct of a full-service and full facility fixed base operation or the general conduct of any aviation related business, including the following permitted uses (I) Aircraft and Rotorcraft (sic),

> charter, air taxi, air freight and commuter service, scheduled and nonscheduled air carrier service."

On December 19, 1994, Golden Eagle Charter entered into a sublease with the Denver Jet Center. The sublease provided that Golden Eagle may carry on certain operations approved in the lease between Jet Center and the Airport Authority (ACPAA). Under the sublease, Golden Eagle was allowed to use the premises for the "purpose of operating aircraft charter, air taxi, air freight, and commuter service as provided for in paragraph 5B(I) of the Arapahoe County Fixed Base Operation Lease between Sub-lessor and ACPAA. [FAA Exhibit 1, Item 5, Brief in Opposition to Preliminary Injunction Order, pages 16-17]

In accordance with its Air Carrier Certificate, Golden Eagle (d/b/a Centennial Express) began scheduled air carrier operations on December 20, 1994. Golden Eagle began its operations with one, six-passenger Beechcraft King Air aircraft, the only aircraft approved by the FAA for Golden Eagle use. CEA's Air Carrier Certificate entitled it up to four (4) round trips per week, per destination, both intra and interstate. In order to exceed four round trips per week per city pair, the air carrier becomes a commuter air carrier, subject to different regulatory requirements. [FAA Exhibit 1, Item 3, exhibit H, page 4]

On January 30, 1995, CEA filed a formal complaint in Docket No. 13-95-03 alleging that the ACPAA had prohibited scheduled passenger service at Centennial Airport under FAR Part 135.

On April 24, 1995, the Arapahoe County Public Airport Authority answered Formal Complaint No. 13-95-03 stating that the ACPAA has not violated Federal transportation laws or its Airport Improvement Program (AIP) grant assurances. [FAA Exhibit 1, Item 4, Tab G]

In it's answer, the ACPAA raised seven points:

1. That complainant alleges that a regulation adopted by the ACPAA limiting use of Centennial Airport for conducting scheduled passenger services violates the Federal *air transportation laws* and grant assurances associated with the ACPAA's acceptance of Federal funds under the Airport Improvement Program but in fact, the Complainant has neither been found fit nor been granted certification as an air carrier.

2. That the Complaint's allegation that the Authority has violated preemption provisions of the Federal Air Transportation Law and Airport Grant Assurances is misguided;

3. That CEA has not been found fit and therefore is not affected by the Authority's policy; (see I.)

4. That the Authority's regulation preserving Centennial Airport as a general aviation reliever facility is a reasonable limitation on the use of the airport.

5. That an FAR Part 13.5 enforcement proceeding is an inappropriate forum to resolve the issue of retaining Centennial Airport as a general aviation reliever airport.

6. That forcing Centennial to accept scheduled service would needlessly undermine the Federal investment in the Denver International Airport; and;

7. That compelling Centennial to accept scheduled operations would be at least premature in light of pending

action to extend the airport certification requirement. (Aviation Rulemaking Advisory Committee; Airport Certification Issues – New Task 60 *Fed. Reg.* 21582)[5]

On July 31, 1995, CEA responded to the ACPAA's Answer (13-95-03) generally asserting that the allegations contained in the Complaint have merit and responding point by point to each of the County's contentions as follows: [FAA Exhibit 1, Item 3, Attachment C]

1. The ACPAA's accusation that CEA did not have proper Department of Transportation (DOT) authority is incorrect because Golden Eagle Charters, Inc., d/b/a Centennial Express Airways, Inc. holds a valid part 135 Air Carrier Certificate (attached as Exhibit A) which is limited to four (4) round trips per week both inter-and intrastate.

2. The Federal government should invoke the AIP grant assurances to compel ACPAA to allow scheduled service under 14 CFR Part 135 (30 seats or less).

3. CEA was and always had been in compliance with all rules and regulations set by DOT and FAA governing CEA's actions.

4. The allegations from ACPAA that Centennial Airport was conceived as a general aviation reliever airport and would serve all types of civil service other than scheduled air carriers was erroneous.

5. ACPAA should not be permitted under FAA Order 5190.6A to approve limitations on the use of an

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[5] The Aviation Rulemaking Advisory Committee (ARAC) is currently reviewing its task as assigned. To date, no official notice has been published requesting public comment on this issue.

airport by a particular type, kind, or class or aeronautical use, because such action is not necessary for the safe operation of the airport or necessary to serve the civil aviation needs of its public.

6. There is no justification to have a forced monopoly at the Denver International Airport (DIA) for all Denver residents; there are certain local areas and regional routes that could be better served by the outlying airports, such as Centennial.

7. CEA believes that nothing will change under the action referenced by the ACPAA.

On September 21, 1995, the ACPAA responded to CEA's reply by stating generally that the issue is "whether the fundamental role of the Centennial Airport should be compelled to change . . . on the basis of Complainant's intentions." ACPAA also states that "based on the evidence provided by Complainant itself, there is no question that Complainant's objective . . . is to have Centennial Airport transformed into a full-fledged commercial service facility." [FAA Exhibit 1, Item 4, Exhibit H]

The ACPAA's answer and CEA's reply were included as exhibits in each party's pleading in the Part 16 proceeding discussed below. Because the ACPAA's answer represented the most comprehensive statement of its position, its answer is addressed in detail in this determination.

Part 16 Proceeding

On February 23, 1998, CEA re-filed its original Part 13 complaint under FAR Part 16. In this new submission

(FAA Docket No. 16-98-05), CEA raised the same allegations as had previously been alleged under FAR Part 13.

Substantially the same documents were used in this Part 16 proceeding as were considered in the Part 13 complaint. [FAA Exhibit 1, Item 3]

On April 8, 1998, ACPAA answered the Part 16 complaint and continued to present its argument that the airport should not be required to accept scheduled commercial air carrier service. [FAA Exhibit 1, Item 4]

The ACPAA states in their Answer that CEA is not entitled to any relief; and that it is not preempted by federal law from banning scheduled passenger service because of its reserved proprietary powers to ban such service. ACPAA also states that the Minimum Standards for commercial aeronautical activities banning scheduled passenger service is, as determined by the trial court, consistent with the safe operation of Centennial Airport. [FAA Exhibit 1, Item 4, page 3]

On April 16, 1998, John Andrews submitted a letter to Docket No. 16-98-05 that stated that "we are in receipt of the answer by the Arapahoe County Public Airport Authority, to our complaint . . . we choose not to reply." [FAA Exhibit 1, Item 8]

On April 29, 1998, the ACPAA submitted a rebuttal to the Docket. Because CEA did not submit a reply to ACPAA's answer, and so stated by letter, there is no pleading to rebut. Part 16 complainants and respondents are each entitled to two (2) submissions to the Docket, however, a party to the proceeding may choose not to exercise this right. In that case, the Docket would then be closed.

ACPAA's rebuttal is therefore being rejected as an unauthorized pleading.

However, we will take this opportunity to note that the rebuttal presented by the ACPAA consisted entirely of the Opinion of the Colorado Supreme Court Case No. 97-SC-123. The FAA is taking official notice of this Opinion as discussed below.

FAA is consolidating the Part 13 dockets and their administrative records into the Part 16 proceeding. Consolidation into Part 16 will avoid duplicative proceedings and assure that the Part 16 complaint is addressed within the time requirements of that regulation. Exhibits provided by the ACPAA in response to the Part 13 proceedings are also included as exhibits in the Part 16 proceeding.

ANALYSIS AND DISCUSSION

Economic Discrimination

CEA alleges that its proposed application for scheduled commuter air service at the Centennial Airport has been denied without fair consideration. CEA further alleges that this violates the commitments made by the ACPAA in accepting airport development grants.

CEA proposed to initiate scheduled passenger service at Centennial Airport, offering commuter service using aircraft with a maximum capacity of 30 passenger seats or less under Federal Aviation Regulation Part 135. Currently, Centennial Airport has non-scheduled, air taxi operations with aircraft seating 30 passengers or less. CEA proposes a similar operation except on a scheduled

basis. Under current FAA regulations, the activity proposed can be accommodated at Centennial Airport without the requirement to obtain a Part 139 certificate.

According to FAA regulations, the airport sponsor is not required to possess a Part 139 certificate for this type of operation. If, however, any operator desires to exceed the 30 seat limit, the airport sponsor must possess an airport operating certificate. However, the FAA will not require the sponsor to seek a Part 139 certificate simply because an operator is petitioning to provide service with aircraft accommodating more than 30 seats.

As the owner of the airport, the ACPAA has entered into agreements with the FAA for assistance to finance airport development. As required by the Airport and Airway Improvement Act of 1982 and predecessor statutes, the Authority, in each such agreement, has provided the FAA with assurances regarding the operation of the airport. The standard assurances include a commitment that the airport will be available for public use on fair and reasonable terms without unjust discrimination to all types, kinds and classes of aeronautical uses.

Assurance No. 22 conveys FAA's policy on economic nondiscrimination and states in part that the airport will be available as an airport, for public use, on reasonable terms and without unjust discrimination, to all types, kinds and classes of aeronautical use. By banning a scheduled Part 135 service, merely because it is scheduled, while permitting unscheduled Part 135 air taxi and charter operations, Centennial Airport is effectively discriminating against CEA. The ACPAA has not provided

sufficient justification for this discrimination, as discussed below.

The Grant Assurance [No. 22, Economic Nondiscrimination] that permits the County to limit or prohibit an aeronautical use for safety or to meet civil aviation needs would not ordinarily, in and of itself, provide sufficient basis for excluding scheduled Part 135 operations. In this case, ACPAA has not provided evidence of safety, efficiency or environmental concerns that would justify the restriction at this airport. In fact, ACPAA has provided virtually no evidence of any kind to support its conclusory claim of adverse safety, efficiency, or environmental effects from scheduled service.

Safety. Because ACPAA permits operation of the same aircraft in nonscheduled commercial service as it has attempted to ban in scheduled service, the Authority cannot argue a safety impact of the scheduled operations *per se*. The argument that scheduled service will result in increased operations at the airport does not support the ban. First, ACPAA has presented no evidence that increased operations would be a safety problem, and indeed could not present such evidence because FAA operating rules and air traffic control would assure safe operations at any level of activity. Second, ACPAA claims that increased airport operations would be a problem but has not taken any measure to limit the total number of operations; the ban of *scheduled* operations does not limit total operations at the airport. Finally, all operations at the airport are conducted by pilots tested and licensed by the FAA; use aircraft certificated by the FAA for airworthiness; follow FAA operating rules; and follow the direction of FAA air traffic controllers. ACPAA has not

provided a single item of information that would suggest any safety problem in any of these operations, scheduled or otherwise.

Congestion. ACPAA has not provided information that would support a claim that congestion at Centennial Airport is or will become a problem requiring a limit on operations. Centennial is a busy airport, and individual operators may experience delays at times of peak operation. However, a limit on the number of operations at an airport for reasons of congestion is an extraordinary measure that has been adopted and upheld at only a very small number of airports in the U.S. Also, the concerns about congestion are speculative. In order to uphold an airport restriction on operations, courts have required that existing levels of service have resulted in congestion. *See Midway Airlines, Inc. v. County of Westchester,* 584 F. Supp. 436, (S.D. NY 1984). In any event, the ban on scheduled operations adopted by ACPAA does not limit total operations, and therefore would not directly address the problem of congestion even if it existed.

Environmental effects. Similarly, there is no basis for the ban on environmental grounds, such as limiting the airport operator's liability for noise damages. In order to justify a restriction based on environmental grounds, the ACPAA must prove two things; first, that a noise or other environmental problem actually exists, and second, that the restrictions in question are rationally related to the problem. ACPAA has presented no evidence of specific actual or projected noise impacts to support regulation of any kind. Even if ACPAA presented evidence of a noise problem, a ban on scheduled operations does not control

any characteristic of airport operation relating to the generation of aircraft noise. It does not limit the operation or frequency of use of a particular aircraft type; it does not limit total operations; it does not limit hours of operation; and it does not prescribe a maximum noise level, either for single events or cumulative effect. There is no evidence or even a claim that the turboprop aircraft proposed for scheduled operation would be the noisiest aircraft operating at the airport; in fact, the airport receives a substantial number of business turbojet operations, which ACPAA has not limited in any way. This situation is comparable to the FAA determination in *San Francisco Airports Commission, FAA Docket 13-86-2,* decided on 12/21/88, where FAA determined that a restriction based on the date of an aircraft's certification as a Stage II aircraft was unjustly discriminatory because other, noisier aircraft were allowed to operate.

A restriction to control noise might also be subject to the requirements of the Airport Noise and Capacity Act (ANCA). ANCA and the FAA's implementing regulations, 14 C.F.R. Part 161, stipulate specific steps that must be followed before an airport sponsor imposes certain airport noise or access restrictions. ACPAA did not follow the specified procedures before imposing restrictions in this case.

In addition, the assurance permitting a sponsor to limit aeronautical use to serve the public's civil aviation needs has not been applied in a case where the restricted use did not impair other uses of the airport necessary to meet the public's needs. Thus, the grant assurance would apply only if Centennial's scheduled service interfered with the function of Centennial Airport as a reliever

airport. Review of the record does not substantiate any claims that the scheduled service would adversely affect the use [sic] Centennial Airport for general aviation.

Until CEA approached the ACPAA with its proposal to establish scheduled Part 135 operations, ACPAA's public position was that scheduled air carrier service, with fewer that [sic] 30 seats, was within the airport's mission. [FAA Exhibit 1, C-6, page 2]

By denying access to CEA to establish scheduled Part 135 operations, ACPAA has effectively violated the grant assurance no. 22(a) restriction on economic non-discrimination.

In its defense, ACPAA presents several arguments that will be addressed individually below. The FAA has found none of these arguments to be persuasive. [FAA Exhibit 1, Item 4]

1 ACPAA states in its Answer that CEA has "neither been found fit or been granted the certification as an air carrier by the Department of Transportation and therefore, CEA may not hold out or operate scheduled service.

CEA, in it's Reply, states that "Golden Eagle Charters, Inc., d/b/a Centennial Express Airways, Inc., holds a valid Part 135 Air Carrier Certificate which is limited to four (4) round trips per week, both inter- and intrastate. [FAA Exhibit 1, Item 3, Exhibit A] The ACPAA may require in a lease agreement that CEA or any other applicant performing the same or similar operations hold the requisite Federal authority for conducting operations

conducted at the Centennial Airport. The record establishes, however that CEA holds FAA authority that permits limited scheduled service. [FAA Exhibit 1, Item 3, Exhibit A]

2 ACPAA argues that the introduction of scheduled service at Centennial would raise significant safety and environmental concerns. ACPAA does not state which specific safety or environmental concerns this activity would raise, appearing instead to rely on the grant assurance that states that "In the interest of safety, the airport owner may prohibit or limit a given aeronautical use of the airport if such action is necessary for the safe operation of the airport."

For the reasons discussed above, the FAA has determined that the ACPAA has not justified an access restriction based on safety, congestion or environmental grounds. Moreover, a ban on scheduled operations would not be a reasonable and nondiscriminatory response even if some restrictions were justified. The FAA recognizes the sponsor's obligation to protect against adverse effects on airport operations such as undue ramp congestion on the ground or lack of adequate ground-side facilities. However, in accordance with the grant obligations, these concerns can and should be addressed in the first instance through adoption of appropriate minimum standards for scheduled commuter facilities and operations. Lack of a public passenger terminal with baggage handling facilities does not justify a commuter service ban at this airport, since on-demand air taxi operations have been providing passenger services without these facilities. The FAA Chief Counsel has determined that a carrier may not be denied access to an airport solely based on the nonavailability of currently existing facilities and that some

arrangements for accommodation must be made if reasonably possible. See FAA Order 5190.6A@ 4-15(d). This guidance is especially applicable in this case, where CEA had obtained access to facilities through a sub-lease.

Where a sponsor has defended a challenged restriction on safety grounds, the FAA will make the final determination of the reasonableness of the airport owner's restrictions which deny or restrict use of an airport. [FAA Airport Compliance Order 5190.6A, page 16]

3 ACPAA presents the argument that the Federal government should not invoke the airport grant assurances to compel Centennial to accept scheduled service despite strong community opposition and continuous confirmation of its role as a reliever airport in both regional and Federal airport plans. ACPAA also argues that the context of a Part 13 enforcement proceeding is not the proper forum for this type of decision to be made.

When an airport sponsor requests and accepts Federal airport assistance, it signs a binding agreement that includes a commitment to comply with specific grant assurances. These grant assurances are included in the documents that an airport sponsor receives with each and every grant. Most of the grant assurances, including those at issue in this case, are established by statute, and the sponsor does not have the option to pick and choose those assurances with which it will comply. It is a sponsor's responsibility and right, before accepting a grant, to understand and determine if compliance with all of the grant assurances is acceptable to the community. The responsibility includes a reasonable effort to resolve differences of opinion over the nature of those obligations.

Once a grant is accepted, a sponsor's local authority is constrained by the obligations, which the sponsor undertakes in exchange for valuable consideration, i.e., the Airport Improvement Program grants. Further, Part 16 (or Part 13 for cases filed before December 16, 1996) is the appropriate forum to analyze alleged violations, as will be discussed.

4 The ACPAA sets forth the argument that the Authority's regulation preserving Centennial as a general aviation reliever facility is a reasonable limitation on the use of the airport.

Airport sponsors can plan for, promote and orient sponsor-financed infrastructure to advance the airport's role as a reliever airport. Additionally, an airport does have the right to designate certain runways or other aviation use areas at the airport to a particular class or classes of aircraft as a means of enhancing airport capacity or ensuring safety. Any such restrictions should be clearly supportable, based on operational considerations and not instituted as a means of deliberately discriminating against a particular class.

As the owner of the airport, the ACPAA has entered into agreements with the FAA for assistance to finance airport development. As required by the AAIA, and predecessor statutes, the ACPAA, in each such agreement has provided the FAA with an assurance that the airport will be available for public use on fair and reasonable terms without unjust discrimination to all types, kinds and classes of aeronautical uses. The FAA does consider an airport's classification as a general aviation and/or reliever airport to limit the obligation to provide for access to all types, kinds and classes of aeronautical use.

A designation as "reliever airport" is not a basis for banning scheduled Part 135 operations at Centennial. As noted previously, the claim that commuter operations will fundamentally alter Centennial Airport's character is speculative and unsupported. Non-scheduled FAR Part 135 operations are considered a general aviation use. There are currently operators based at Centennial Airport that do provide FAR Part 135 non-scheduled services. The operations of the same aircraft types in scheduled service would not have distinct operational effects that would support an access restriction.

Prior to CEA's efforts to initiate scheduled service, ACPAA itself apparently did not consider scheduled Part 135 operations to be inconsistent with its role as a reliever airport. ACPAA, in public documents, has stated that "The Authority has the responsibility and authority to promote and facilitate air transportation, commerce and navigation by air for the benefit and welfare of the State of Colorado, its political subdivisions, and its inhabitants." Additionally, ACPAA has stated that "No scheduled air carrier, either large or small, has applied to the Authority to operate at the Airport. Should any apply, the Authority will consider only the smaller, regional air service applications." Also, the ACPAA has stated that "The Authority reaffirms the original intent of the airport to serve the general aviation community. To this end, Centennial will continue to accommodate aircraft operating under Federal Aviation Regulation Part 135/Operations Specifications 135 (30 or fewer seats). Requests for scheduled air service shall be reviewed for compliance with this policy, the established weight limit, and the applicable minimum standards."

It had been the intention of the ACPAA to accept applications from entities such as CEA and that, at one time, the ACPAA viewed air service as a positive aspect of the services provided by the Centennial Airport to the surrounding community. A sponsor is not free, once Federal funds have been used to support its infrastructure needs, under the grant assurances, to bar service at the airport just because local preferences change. In some localities, a single airport sponsor owns and operates more than one airport. In such a case, where the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system (under the same ownership and serving the same community) for use by a particular class or classes of aircraft. The owner must be in a position to assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the sponsor's control and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity. See Order @ 4-8(d)

As the operator of a single airport, the ACPAA may not rely on this policy to exclude scheduled Part 135 operations. It cannot assure that all classes of aeronautical need can be fully accommodated if they are barred from Centennial airport.

In these circumstances, the ACPAA cannot rely on the reliever airport concept to exclude 14 CFR Part 135 scheduled operations.

5 ACPAA avers that an enforcement proceeding is an inappropriate forum to resolve the issue of retaining

Centennial as a general aviation reliever airport, arguing instead that this is a matter of broad airport policy and should be addressed within a deliberative process. ACPAA additionally states that "an enforcement proceeding necessarily deals with specific allegations involving the conduct of one party."

FAA believes that an enforcement proceeding is in fact the proper forum to decide if a denial of access to a federally-funded airport is unjustly discriminatory. The ACPAA has taken numerous AIP grants over the years and has a continuing obligation to comply with the grant assurances based on current FAA policy.

6. ACPAA argues that forcing Centennial to accept scheduled service would needlessly undermine the Federal Investment in Denver International Airport. ACPAA states in its arguments that "Compelling Centennial Airport to accept scheduled service will needlessly undermine the Federal government's investment in Denver International and contravene Centennial's intended purpose. Centennial is meant to play a supporting role in the success of Denver International by helping to meet the region's general aviation needs."

Potential economic harm to another airport would never justify an access restriction under the grant assurance that requires Centennial Airport to be accessible to all categories of aeronautical users on reasonable terms, except possibly in the limited circumstances of a single operator of a multiple airport system, as discussed above.

Moreover, ACPAA's suggestion that introduction of scheduled commuter services would have a significant adverse impact on Denver International Airport (DIA) is speculative. DIA holds an airport operating certificate

under Part 139; it was designed and constructed primarily to serve Part 121 operations. While DIA has extensive commuter operations under Part 135, many of the passengers on those flights use DIA to connect to the Part 121 operations. Part 121 operations cannot be conducted at Centennial. Thus, there is no danger that introduction of scheduled commuter operations at Centennial will cause a transfer of Part 121 operations away from DIA. Moreover, to the extent that the Part 135 scheduled operations at DIA depend on connecting passengers for their economic viability, those operations are not likely to relocate either.

7. ACPAA states that compelling APA to accept scheduled operations would be at least premature in light of pending consideration of recommendations to require that all airports served by air carriers that provide scheduled passenger service be certificated under Part 139.

Section 404 of the 1996 FAA Authorization Act permits the FAA to extend the airport certification requirement to airports with scheduled service with aircraft with 10 or more seats. To date, the FAA has not yet published even a notice of proposed rulemaking. Until an amendment to Part 139 is adopted as a final rule, any airport may receive scheduled service by aircraft with 30 seats or fewer. The FAA is obliged to consider ACPAA's compliance in light of the current requirement of FAR part 139. Should the FAA adopt an amendment to part 139 to apply to more than 10 seat aircraft, than [sic] any scheduled operation at Centennial would need to conform to the requirements of the new amendment.

Exclusive Rights

CEA alleges that by denying permission to conduct an aeronautical activity, Part 135 *scheduled* air service, on the airports in question, and by permitting other Part 135 *unscheduled* activities to be conducted, the ACPAA is in violation of the provisions regarding exclusive rights set forth in Section 511 (a)(2) of the Airport and Airway Improvement Act (AAIA), 49 U.S.C., 47107(a)(4) as amended, and Section 308(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 40103(e), as amended, and the Federal grant assurances.

The ACPAA claims that it has not granted an exclusive right to operate *unscheduled* air carrier service

The FAA interprets an exclusive right as the granting of any special privilege, power or right to provide an aeronautical service on the airport to the exclusion of others. Existence of an exclusive right to conduct any aeronautical activity at an airport limits the usefulness of the airport and deprives the using public of the benefits of a competitive enterprise.

The ACPAA has allowed commercial operators to conduct 14 CFR Part 135 *unscheduled* operations without unreasonable restriction while it has denied CEA the ability to operate under Part 135 with *scheduled* air services even though both operations use the same general kind of aircraft. Indeed, the ACPAA obtained and successfully defended a permanent state court injunction barring CEA's scheduled operations. By granting unscheduled operators the right to provide aeronautical services while excluding scheduled operators, the airport operators have granted a prohibited exclusive right to

conduct air carrier operations to on-demand air taxi operators.

FAA Order 5190.6A explains the FAA's policy, stating,

> [a]part from legal considerations, the FAA considers it inappropriate to provide Federal funds for improvements to airports where the benefits of such improvements will not fully be realized due to the inherent restrictions of an exclusive monopoly on *aeronautical activities.*
>
> FAA Order 5190.6A, paragraph 3-8(a), page 8.

The policy applies equally here where one class of Part 135 service, scheduled operations, is excluded, while another, on-demand services, is permitted and there is no significant operational difference between the two.

In addition, Airport Improvement Program Assurance 23 (to which all AIP grant recipients are bound), states that the sponsor " . . . will permit no exclusive right for the use of the airport by any person providing, or intending to provide, *aeronautical services* to the public." Airport Improvement Program sponsor assurance no. 23, page 11 (Jan. 1995 edition) (emphasis added). FAA Order 5190.1 A, "Exclusive Right," paragraph 8, which states that "the grant of an exclusive right for the conduct of any aeronautical activity is contrary to applicable law . . . whether such exclusive rights results from express agreement or from the imposition of unreasonable standards or requirements, or any other means." As discussed above, the ACPAA has established an unreasonable policy. It has, therefore, granted a prohibited exclusive right.

The FAA is charged with the responsibility of bringing about or enforcing compliance with the exclusive right

provision of Section 308 of the Federal Aviation Act of 1958 and Section 303 of the Civil Aeronautics Act of 1938.

Even before adopting an explicit ban on scheduled service, and obtaining an injunction against CEA, the ACPAA took actions, or failed to act, in violation of the exclusive rights prohibition. Prior to 1991, when CEA sent a letter to the ACPAA requesting that minimum standards be set under which CEA would be allowed to operate, Centennial had a stated airport policy of encouraging commercial service "in the form of Part 135 charter/air taxi certification, whether scheduled or unscheduled. Such activity may not be prohibited but is limited to aircraft with 30 seats or less." [FAA Exhibit 1, C-6, page 2]

After a delay of several months following the request for minimum standards, the ACPAA notified CEA that the airport was revising its airport policy statement and that the new policy would have to be completed prior to the minimum standards being enacted. After 16 months, the ACPAA adopted minimum standards for Part 135. At the same time, a moratorium on accepting new applications for scheduled service operations was also adopted. [FAA Exhibit 1, Item 3, page 3]

There is nothing in the record in this proceeding that shows that the moratorium has ever been lifted. Significant delay in processing an application or request for entry to a Federally-funded airport can in itself be construed as denial of access. (*British Airways Board v. The Port Authority of New York and New Jersey*, 564 F2d 1002 (1997)) This unreasonable denial of access to part of the

category of Part 135 operators amounts to a prohibited grant of an exclusive right.

Federal Preemption of Scheduled Service Ban

Title 49 U.S.C. § 41713 prohibits a state or local govemment from regulating the rates, routes or services of an air carrier authorized to provide air transportation. Section 41713(b)(1) provides, in relevant part, that

> "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under [49 U.S.C. §§ 41101 through 42112]."

However, 49 U.S.C. § 41713(b)(3) establishes an exception to this general prohibition by providing, in pertinent part, that

> "this subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights."

This provision preserves the proprietor's rights to conduct the business of an airport, but it does not create any new powers for the proprietors. The proprietor's rights are still governed, in the case of a grant funded airport, by section 308 of the Federal Aviation Act of 1958, 49 U.S.C. 40103 and the grant assurances. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d

157 (1st Cir. 1989). Moreover, by virtue of the Commerce and Supremacy Clauses of the Constitution, an airport proprietor would be limited to adopting restrictions on rates, routes and services that are reasonable, non-arbitrary and non-discriminatory. *See British Airways BD. v. Port Authority of New York,* 558 F.2d 75 (1977).

The FAA has authority to consider this issue under Section 1002 of the Federal Aviation Act of 1958 (FAAct), 49 U.S.C., § 46101, and § 46105. These provisions grant the FAA the authority to investigate compliance with provisions of the Federal Aviation Act, as recodified, in part A of subtitle VII of Title 49 of the United States Code, including section 41713(b). For the reasons set forth below, the FAA has determined that the ACPAA's ban on scheduled service amounts to the regulation of rates, routes and service within the meaning of § 41713(b), and that the ACPAA's actions fall outside the scope of the proprietor's exemption.

This determination is based on and limited to the specific circumstances existing at Centennial Airport; i.e., the access restriction was implemented after the statutory restrictions contained in 41713(b) were enacted and after the sponsor accepted a grant of Federal airport assistance under the AIAA; the access restriction was adopted by the ACPAA on its own initiative and without a claim of legal obligation; and the complainant in this case had never agreed to any form of restriction on access or service to the airport.

The ban on scheduled service at Centennial Airport by the ACPAA constitutes the regulation of both air carrier service and air carrier routes. With respect to service, the

ACPAA has effectively prescribed the kind of commercial air service that may operate at Centennial Airport – on-demand Part 135 operations. The ACPAA is exercising control over a fundamental air carrier business decision on the kind of service to provide – scheduled or charter. In this regard, the decision in *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) does not limit section 41713(a) to regulations relating to "ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling." Rather, the *Hodges* decision identified these activities as elements of air carrier service "in addition to the transportation itself." *Id.* A decision to offer scheduled or charter service to the public in a particular market is, in the words of the United States District Court in *Butcher v. City of Houston*, 813 F. Supp. 515, 517-518 (S.D. TX 1993), "distinctively incident to the provision of airline service to the public . . . "[6]

In carrying out the purpose of the preemption provision – to avoid inconsistent and conflicting state and local laws regulating the airline industry, we consider the prohibition on scheduled services to be prohibited regulation of an air carrier. In evaluating the restrictions at issue here, the FAA has also considered the impact if corresponding regulations were enacted by local jurisdictions across the

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[6] In the quoted passage, the court was referring to regulations requiring a certain frequency of airline service or mandating non-stop service between certain cities. If these requirements are considered to be regulations relating to air carrier services, it follows that a total ban on scheduled service must also be considered a regulation relating to air carrier services.

country. *See Lockheed Air Terminal Company v. City of Burbank*, 411 U.S. 624 (1974). If the ACPAA's ban on scheduled service were replicated around the country, inconsistent and conflicting laws would almost certainly be developed as some jurisdictions permitted scheduled service into a particular airport while other jurisdictions barred it.

In addition, this unilateral ban on scheduled service creates an inherent conflict with Federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States. Thus, the ban cannot be considered to be "only a peripheral concern of the Act so [that] it could not be inferred that Congress intended to deprive the State of the power to act." *Local 926, International Union of Operating Engineers, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983).

The ACPAA's unilateral ban on scheduled service also represents a regulation of air carrier routes, because the effect of the ban is to prohibit regular operations over any route involving the Centennial Airport. An outright prohibition on operating over any route is as much a regulation of routes as a restriction on the number of routes that a carrier can operate from an airport, or a local ordinance either prohibiting service on a named route. Each of these ordinances would be considered to be a regulation relating to air carrier routes within the meaning of section 41713. *See, e.g. Butcher v. City of Houston, supra*, 813 F. Supp. at 517-518.

Based on the current record in this investigation, the ACPAA has not adequately justified the ban as an exercise of proprietary powers under section 41713(b). As previously noted, the discretion of an airport proprietor under section 41713(b) is not unlimited. In this case, ACPAA's proprietary rights are limited by its obligations under the AIP grant assurances and the statutory prohibition on exclusive rights. A restriction that is inconsistent with these Federal obligations is not within the proprietary powers preserved by section 41713(b). *New England Legal Foundation v. Massachusetts, supra,* 883 F.2d 157.[7]

For the reasons discussed above, the FAA has determined that the ACPAA's scheduled service prohibition is inconsistent with the ACPAA's obligation to provide access to the airport on reasonable terms without unjust discrimination and with the prohibition on granting exclusive rights. The restriction is, therefore, outside the scope of the ACPAA's proprietary powers.

The ban on scheduled service is subject not only to Federal grant obligations but also to limitations under the Commerce Clause and Supremacy Clause of the U.S. Constitution. As a local restriction on interstate commerce, the ban could be permitted under the proprietor's exception only if it were reasonable, non-arbitrary and non-discriminatory. *See British Airways BD v. Port Authority of New York,* 558 F.2d 75 (1977). However, based on the

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[7] The Department of Transportation is currently considering an air carrier access issue in connection with Dallas-Love Field. The circumstances and facts at Dallas-Love Field will be evaluated separately from this proceeding based on the airport specific circumstances existing at the airport.

analysis of the restriction at Centennial under the grant assurances, the FAA is unable to find that the restriction meets this standard.

The courts have recognized that prevention or elimination of ground-side congestion, including congestion in passenger terminals, can provide a basis under the proprietor's exception for restricting air carrier scheduled operations, very limited circumstances. Those cases are not applicable to Centennial Airport. One case involved a perimeter rule adopted by the Port Authority of New York and New Jersey (Port Authority), setting a maximum distance for nonstop flights to LaGuardia airport[8]. The Port Authority controlled two other local airports at which it permitted (and encouraged) nonstop service to the New York City metropolitan area from points beyond the perimeter, and the Port Authority permitted flights to LaGuardia from beyond the perimeter so long as there was at least one stop within the perimeter. While the court recognized that control of ground-side congestion was a legitimate proprietor concern on which to base restrictions on air traffic, and that it was reasonable for the Port Authority to adopt rules designed to alleviate those problems, the decision also turned on the fact that the sponsor operated multiple airports and, through its control of these airports, could assure that scheduled service between New York City and any point in the United States could be accommodated. The ACPAA is not

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[8] *Western Air Lines v. Port Auth. of New York & New Jersey, (Western Air Lines)* 658 F. Supp. 952, *aff'd* 817 F.2d 222 (2d Cir. 1987).

in the position of the Port Authority. It controls only Centennial Airport.[9]

Another case involved the imposition of an hourly limit on the number of scheduled flights. *Midway Airlines, Inc. v. County of Westchester,* 584 F. Supp. 436 (S.D. NY 1984). In that case, the airport had presented compelling factual evidence that the airport terminal suffered from severe overcrowding at existing levels of operations, and that increased operations would, therefore, pose significant risks. As noted previously, the ACPAA's claims of congestion and inadequate facilities are speculative and not supported by evidence. Moreover, the Westchester restriction avoided a discriminatory effect because it did not deny access to the airport to any entire class of operations. Rather, the restriction capped the number of scheduled operations permitted in any hour and distributed the limitation across operations by all scheduled operators. In contrast, the ACPAA ban on scheduled service attempts to resolve claimed congestion and noise problems through a restriction on one class of operator, even though all operators would contribute to the problems if they existed.

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[9] The other decision involving a perimeter rule, *City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184 (5th Cir. 1982) does not provide useful guidance in defining the authority of local governments that are airport proprietors. The perimeter rule in that case was imposed by the Federal Aviation Administration in its role as operator of Washington National and Dulles airports. The court was considering the scope of the Federal Government's authority to set perimeter rules. It was not, therefore, applying the same legal standards that govern state and local airport proprietors.

For these reasons, we conclude that the ACPAA ban on scheduled operations is an impermissible restriction on interstate commerce not permitted under an exception for proprietary rights.

Applicability of National Environmental Policy Act

While the Department was considering the ACPAA's July 1993 request for policy guidance on providing access for scheduled service, the City and County of Denver sought guidance on the application of the National Environmental Policy Act (NEPA) to the introduction of scheduled airline service at Centennial Airport and to an FAA compliance action to require to [sic] ACPAA to accept scheduled service at the airport. The Chief Counsel of the FAA provided that guidance in a letter dated October 22, 1993. To avoid any confusion or misunderstanding, the FAA is taking this opportunity to reaffirm that guidance, subject to clarification based on a change in the nature of the operation that CEA's proposed operation that occurred after the Chief Counsel issued his opinion. [FAA Exhibit 1, C-7]

First, NEPA, and specifically the NEPA requirement to conduct environmental reviews, applies to Federal actions. The action of an airport sponsor to permit individual commercial operators to do business on the airport is not itself a Federal action and is not, therefore, subject to NEPA.

Second, administrative civil enforcement actions, such as the issuance of this determination, are not Federal actions subject to NEPA under the regulations implementing

NEPA, 40 CFR § 1508.18(a). Therefore, this decision is not subject to environmental review.

Finally, when scheduled air carrier service is introduced at an airport, the Federal action that could trigger environmental review would be the issuance of an air carrier operating certificate and operations specifications to an air carrier proposing to introduce scheduled service at the airport. The Chief Counsel's letter concluded that issuance of operations specifications to CEA permitting scheduled service at Centennial would require preparation of an environmental assessment (EA), largely because CEA was, at the time, proposing to operate turbojet service. However, FAA guidelines provide that issuance of an air carrier operating certificate or approval of operating specifications requires an EA only if the new service "may significantly change the character of the operational environment of an airport." FAA Order 1050.1(D), Appendix 4, paragraph 3(e). Thus, if the proposed turbojet service will not change the character of the operational environment at Centennial, no EA is required.

In any event, the issue would be addressed when, and if, CEA submits an application for approval of a modification to its operating specifications to permit scheduled service at Centennial Airport.

FINDINGS AND CONCLUSIONS

Upon consideration of the responses and submissions of the parties, and the entire record herein, including the material in the consolidated Part 13 proceedings, and the applicable law and for the reasons stated above, the FAA

Office of Airport Safety and Standards finds and concludes as follows:

1. The Arapaho [sic] Public Airport Authority (ACPAA), by unreasonably delaying adoption of minimum standards for the operation of scheduled Part 135 air carrier services at Centennial Airport, and by adopting a moratorium on consideration of applications for scheduled Part 135 air carrier services at Centennial Airport in conjunction with the adoption of minimum standards for such services, violated its Federal obligations regarding Economic Nondiscrimination, as set forth in 49 USC § 47107(a)(1) and standard Airport Improvement Program (AIP) grant assurance No. 22.

2. The ACPAA, by banning scheduled air carrier service on or about September 8, 1994, violated its Federal obligations regarding Economic Nondiscrimination, as set forth in 49 USC § 47107(a)(1) and standard AIP grant assurance No. 22.

3. The ACPAA, by unreasonably delaying adoption of minimum standards for the operation of scheduled Part 135 air carrier services at Centennial Airport, and by adopting a moratorium on consideration of applications for scheduled Part 135 air carrier services at Centennial Airport in conjunction with the adoption of minimum standards for such services, violated its Federal obligations regarding Exclusive Rights, as set forth in 49 USC §§ 47107(a)(4) and 40103(e) and standard AIP grant assurance No. 23.

4. The ACPAA by banning scheduled air carrier service on or about September 8, 1994, violated its Federal obligations regarding Exclusive Rights, as set forth in 49 USC §§ 47107(a)(4) and 40103(e) and standard AIP grant assurance No. 23.

5. The ACPAA, by unreasonably delaying adoption of minimum standards for the operation of scheduled

Part 135 air carrier services at Centennial Airport, and by adopting a moratorium on consideration of applications for scheduled Part 135 air carrier services at Centennial Airport in conjunction with the adoption of minimum standards for such services, violated the prohibition on state and local regulations relating to a price route or service of an air carrier as set forth in 49 USC § 41713.

6. The ACPAA, by banning scheduled air carrier service on or about September 8, 1994, violated the prohibition on state and local regulations relating to a price, route or service of an air carrier as set forth in 49 USC § 41713.

ACCORDINGLY, the FAA Orders that:

1. The Arapahoe County Public Airport Authority (ACPAA) present a plan to the Airports Division, Northwest Mountain Region of the FAA within 20 days from the date of this Director's Determination on how it intends to address the FAA's concerns by eliminating the violations outlined above;

2. Pending FAA approval of the corrective action plan specified in Ordering Paragraph 1, or until further notice, the ACPAA is ineligible to apply for new FAA grants pursuant to 49 USC § 47106(d).[10]

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[10] The 180-day limit on suspension of eligibility contained in section 47106(d) applies only to applications to receive AIP funds apportioned under 49 USC §§ 47114(c) and (e). The ACPAA is not eligible to receive these apportioned funds. Therefore, the 180-day limit does not apply.

FURTHER:

If the ACPAA does not submit a corrective action plan in accordance with Ordering Paragraph 1 above or appeal this determination as set forth below, the FAA proposes to issue an order pursuant to 49 USC § 47122 directing the ACPAA to eliminate the violations outlined above. The failure to comply with that order would result in permanent termination of the eligibility of the ACPAA for new FAA grants.

These determinations are made under 49 U.S.C. Section 47107 (a)(4) as amended by Pub. L. No. 103-305 (August 23, 1994).

Opportunity to Request a Hearing Or an Appeal

Pursuant to Federal Aviation Regulations, 14 CFR Part 16, the Arapahoe County Public Airport Authority may request a hearing under subpart F of Part 16 within 20 days after service of the Director's Determination. See 14 CFR Section 16.109. The Arapahoe County Public Airport Authority may waive a hearing and appeal the Director's determination directly to the FAA Associate Administrator for Airports within 30 days of service of the Director's determination as provided in 14 CFR Section 16.33.

/s/ David L. Bennett
David L. Bennett
Director, Office of Airport Safety
and Standards

CENTENNIAL EXPRESS AIRLINES and GOLDEN EAGLE CHARTERS d/b/a CENTENNIAL EXPRESS AIRLINES v. ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY

FORMAL COMPLAINT No. 16-98-05

INDEX OF ADMINISTRATIVE RECORD
(Includes exhibits from
Docket Nos. 13-94-25 and 13-95-03

The following documents (*Items*) constitute the administrative record in this proceeding:

Item 1 – FAA Form 5010, dated 1/15/96 for Centennial Airport;

Item 2 – Centennial/Arapahoe County AIP Grant History, dated 4/24/97, listing the federal airport improvement assistance provided to the airport sponsor since 1983;

Item 3 – Formal Complaint, Docket No. 16-98-05, dated 2/23/98, by Centennial Express Airlines (CEA) against the Arapahoe County Public Airport Authority, including Exhibits A- I and attachments:

- Attachment A – Colorado Court of Appeals, Arapahoe County Public Airport Authority v. Centennial Express Airlines, December 12, 1996
- Attachment B – Arapahoe County Public Airport Authority Airport Bond and Revenue Anticipation Notes, Series 1984, December 1, 1984
- Attachment C – Centennial Express Airlines v. Arapahoe County, Formal Compliant No. 13-95-03
- Exhibit A – Copy of Air Carrier Certificate
- Exhibit B – Copy of FAA Definition Related to General Aviation and Air Carrier

- Exhibit C – Contains the Rocky Mountain News, Article Dated 1-19-95
- Exhibit D – Copy of Letter from ACPAA Offering to Support CEA's 121 Operation
- Exhibit E – Several news articles and letters stating that the ACPAA was considering scheduled service, both 121 and 135. Includes Minutes of the ACPAA Board Meeting, December 10, 1992
- Exhibit F – Copy of Grand Junction Airport Letter and Supporting Data including Answer of the ACPAA to CEA's Part 13 Complaint (13-95-03)
- Exhibit G – Copy of Colorado DOT Letter, August 31, 1993, also, corrected copy of Minutes of the ACPAA Board Meeting on 12/10/92
- Exhibit H – Copy of Brief filed with Colorado Court of Appeals

Item 3 – A Notice, dated 3/16/98, indicating docketing of 16-98-05.

Item 4 – Answer of the Arapahoe County Public Airport Authority and Board of County Commissioners of the County of Arapahoe, Colorado, dated 4/8/98, to the Complaint of Centennial Express Airlines, Docket No. 16-98-05, including attachments at Tabs A – H and 1 – 10

Tab A – Permanent Injunction Order, ACPAA v. CEA, dated January 12, 1995

Tab B – The Court of Appeals of the State of Colorado, Order, Case number 95CA0307

Tab C – ACPAA v. CEA, Case Number 95CA307, Index of Record

Tab D – Supreme County [sic], State of Colorado, Case Number 97SC123, Opening Brief of the Arapahoe County Public Airport Authority.

Tab E – Supreme County [sic], State of Colorado, Case Number 97SC123, Reply Brief of the Arapahoe County Public Airport Authority.

Tab F – Answer of the ACPAA to the Complaint by Tom Kehmeier, Docket No. 13-94-25

Tab G – Answer of the ACPAA to Complaint No. 13-95-03

Tab H – Response of the ACPAA to Complaint No. 13-95-03

Tab 1. CEA's Operating Application presented to the ACPA [sic], dated 5/7/93.

Tab 2. Letter to Don Crandall, Exec. Dir, Centennial Airport from John Andrews.

Tab 3. Minutes, dated 2/16/65

Tab 4. Resolution, dated 2/15/66, regarding construction of Centennial Airport.

Tab 5. Article from Denver Post, dated 4/13/66.

Tab 6. Resolution, dated 7/13/84, regarding name change of airport.

Tab 7. Letter, dated 6/26/86, from Walter Barbo, Mgr, Denver ADO.

Tab 8. Miscellaneous pages from examination and cross-examination of Jim Delong, Director of Aviation at Denver Intl. Airport. (no date on documents)

Tab 9. Terminal Area Forecasts FY 1993-2010, FAA-APA-94-11

Tab 10. Court of Appeals, State of Colorado, Case No. 95CA307, Answer Brief of Arapahoe County Public Airport Authority, dated 8/21/95.

Item 5 – Supreme Court, State of Colorado, ACPAA v. CEA, Certiorari to the Colorado Court of Appeals, Judgement Reversed.

Item 6 – Two Hundredth Twenty'Eighth Meeting of the ACPAA – Airport Policy Statement

Item 7 – CEA's Appeal to Court of Appeals, State of Colorado from Permanent Injunction against operations at Centennial Airport

Item 8 – Facsimile from John Andrews dated 4/16/98, stating intent not to reply to ACPAA's answer to Docket No. 16-98-05

Item 8-A – Rebuttal of the ACPAA, dated 4/29/98, consisted exclusively of the Opinion of the Colorado Supreme Court in Case No. 97-SC-123 entered on April 13, 1998, reversing the Colorado Court of Appeals.

PART 13 Docket Items:

Item 9 – Formal Complaint No. 13-94-25, dated 8/7/94, filed by Thomas Kehmeier against the Arapahoe County Public Airport Authority, in accordance with the FAA Investigative and Enforcement Procedures (14 CFR Section 13.5).

Item 9A – Letter dated 12/23/94 from FAA serving complaint on ACPAA.

Item 9B – Letter dated 12/23/95 from FAA to Thomas Kehmeier acknowledging receipt of complaint.

Item 9C – Record of telephone call dated 1/6/95, between John Andrews, Mark Pottinger, Nancy Van Ness et al. Regarding status of permanent injunction hearing.

Item 9D – Letter dated 1/9/95, from law office of Brega & Winters (representing ACPAA) requesting extension of time to file an answer to Docket No. 13-94-25.

Item 10 – Answer, dated 2/1/95, of the Arapahoe County Public Airport Authority to the complaint by Mr. Thomas Kehmeier.

Item 10A – Letter, dated 2/23/95, from National Business Aircraft Association regarding CEA's complaint and voicing support, to FAA, Office of the Chief Counsel.

Item 11 – Formal Complaint No. 13-95-03, (with Exhibits A – F) dated 1/23/95, filed by Centennial Express Airlines and Golden Eagle Charters d/b/a Centennial Express Airlines against the Arapahoe County Public Airport Authority, in accordance with the FAA Investigative and Enforcement Procedures (14 CFR Section 13.5).

Item 11A – Letter dated 3/795 [sic], to John Andrews, acknowledging receipt of formal complaint.

Item 11B – Letter dated 3/7/95, to ACPAA, serving copy of formal complaint.

Item 11C – Letter dated 3/10/95, to Kathleen Connon, FAA Office of the Chief Counsel, from ACPAA, regarding missing documents from service letter of 3/7/95.

Item 11D – Letter, dated 3/28/95, from FAA to ACPAA, serving complaint No. 13-95-03.

Item 12 – Answer, dated 4/24/95, of the Arapahoe County Public Airport Authority to the Centennial Express Airlines, Inc. complaint with general information attachments.

Item 12A – Letter, dated 6/19/95, to Ronald Loser, Brega & Winters, informing of FAA's consolidation of formal complaints Nos. 13-94-25 and 13-95-03.

Item 12B – Letter, dated 7/6/95, to Thomas Kehmeier, from FAA, serving ACPAA's Answer to complaint No. 13-94-25.

Item 13 – Reply from Centennial Express Airlines, Inc., with Exhibits A – H, dated 7/31/95, to the Answer of the Arapahoe County Public Airport Authority.

Item 13A – Motion to Strike of The Arapahoe County Public Airport Authority, dated 8/15/95, moves to strike the July 31, 1995 letter of CEA which purports to reply to the April 24, 1995 Answer of the Authority to the CEA's complaint, No. 13-95-03.

Item 13B – Letter, dated 8/25/95, from FAA to ACPAA, serving Rebuttal by CEA to April 24, 1995 Answer by ACPAA.

Item 14 – Response of the Arapahoe County Public Airport Authority, dated 9/21/95, to the Response from Centennial Express Airlines, Inc., including attachments at Tabs 1 -10

> **Tab 1.** CEA's Operating Application presented to the ACPA [sic], dated 5/7/93.
>
> **Tab 2.** Letter to Don Crandall, Exec. Dir, Centennial Airport from John Andrews.

Tab 3. Minutes, dated 2/16/65

Tab 4. Resolution, dated 2/15/66, regarding construction of Centennial Airport.

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Tab 9. Terminal Area Forecasts FY 1993-2010, FAA-APA-94-11

Tab 10. Court of Appeals, State of Colorado, Case No. 95CA307, Answer Brief Appellee Arapahoe County Public Airport Authority, dated 8/21/95.

Item 15 – Memorandum dated 10/26/95, Mgr. Airports Law Branch, FAA, to Mgr. AAS-300, transmitting Dockets no. 13-95-03 and 13-94-25 for review and investigation.

Item 16 – Proposed Policy Encouraging Metropolitan Planning Organizations and Airport Operators to Cooperate in Transportation Planning, dated 1/28/97, Federal Register, Volume 62, Number 18.

Correspondence:

C-1 – Letter, dated 12/12/91, from John Andrews, President, Centennial Express Airlines to Executive Director,

Ed Ryan, (Arapahoe County Public Airport Authority), with attached Resolution dated April 8, 1993.

C-2 – Letter, dated 12/15/92, from Elaine T. Valente, Chairman, Board of County (Adams) Commissioners and Ed Lappart, Acting Chairman, Adams County Airport Authority to Wellington Webb, Mayor of Denver, regarding intergovernmental agreement.

C-3 – Letter, dated 3/8/93, from Harold Kite, Board of Adams County Commissioners, to Wellington Webb, Mayor of Denver, rescinding intergovernmental agreement.

C-4 – Letter, dated 7/20/93, from Quentin Taylor, Acting Assistant Administrator for Airports to Steven Parsons.

C-5 – Letter, dated 7/21/93, from Jennie Jolly, Chairman, Arapahoe County Public Airport Authority, to Patrick Murphy, Deputy Asst. Secretary Policy and Program Development, DOT. Exhibits include:

Congressional letter, dated 6/28/93 regarding concerns of the ACPAA

Centennial Aerogram, dated 5/1/92

Centennial Airport Policy Statement, dated 3/12/92

Letter, dated 10/17/91 from Jeannie Jolly, Chairman, ACPAA to G. Mayo

Letter, dated 10/3/90 from Harold Patton, Jr, Chairman, ACPAA to G. Mayo

Centennial Aerogram, dated 10/3/89, regarding adoption of airport policy Statement

ACPAA information on airport bond and revenue anticipation notes, 12/13/84

C-6 – Letter, dated 8/27/93, from Brownstein, Hyatt, Farber & Strickland, P.C., to Patrick Murphy. Exhibits include:

Centennial Aerogram, dated 2/20/89, discussing scheduled air carriers

Advertisement, circa 1989, discussing Centennial Airport

Centennial Aerogram, dated 10/3/89

Centennial Aerogram, dated 5/1/92

ACPAA information on airport bond and revenue anticipation notes, 12/13/84

C-7 – Letter, dated 10/22/93, from Mark Gerchick, Chief Counsel/DOT, to James DeLong, Director of Aviation, City and County of Denver, Stapleton International Airport.

C-8 – Letter, dated 1/13/94, from Patrick Murphy, to Carrie Mineart, Attorney at Law, Brownstein, Hyatt, Farber & Strickland, P.C.

C-9 – Letter, dated 2/25/94, from John W. Andrews to James Whitlow, Office of the Chief Counsel, FAA.

C-10 – Press Release, dated 12/20/94 "Centennial Express Begins Scheduled Flights"

C-11 – Letter, dated 12/23/94, to Jeannie Jolly, from Frank B. Kruesi.

C-12 – Letter, dated August 17, 1994, from Frank W. Haskett to FAA, Denver Airports District Office and FAA, Office of the Chief Counsel, providing comments on Docket No. 13-94-25.

C-13 – Letter, dated 2/8/95, from National Air Transportation Association regarding CEA's complaint and voicing support, to FAA, Office of the Chief Counsel.

SUPREME COURT, STATE OF COLORADO

NO. 97SC123

April 13, 1998

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY,
a political subdivision of the State of Colorado,

Petitioner,

v.

CENTENNIAL EXPRESS AIRLINES, INC., a Colorado corporation; and GOLDEN EAGLE CHARTERS, INC., d/b/a CENTENNIAL EXPRESS AIRWAYS, INC., a Colorado corporation,

Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT REVERSED

Brega & Winters, P.C.

Ronald S. Loser

Brian A. Magoon

Peter A. Gergely

Denver, Colorado

Attorneys for Petitioner

Bryant & Van Nest, LLC

Mark A. Pottinger, of Counsel

Denver, Colorado

Attorneys for Respondents

CHIEF JUSTICE VOLLACK delivered the Opinion of the Court.

JUSTICE SCOTT concurs and specially concurs.

JUSTICE BENDER dissents, and JUSTICE MARTINEZ joins in the dissent.

JUSTICE HOBBS does not participate.

We granted certiorari to review the court of appeals decision in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 942 P.2d 1270 (Colo. App. 1996), to determine whether the court of appeals erred in reversing a permanent injunction entered in favor of the plaintiff, Arapahoe County Public Airport Authority (the Authority), prohibiting the defendant, Centennial Express Airlines, Inc., and its wholly owned subsidiary, Golden Eagle Charters, Inc., d/b/a Centennial Express Airways, Inc. (Centennial Express), from conducting scheduled air carrier service in and out of Centennial Airport (Centennial). We reverse.

I.

Centennial was built in 1967 to serve the growing aviation needs of the Denver metropolitan region and has since become one of the largest and busiest general aviation facilities in the country.[1] Centennial is located fourteen miles southeast of downtown Denver and sits on

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[1] In 1988, Centennial ranked as the twenty-eighth busiest airport in the United States. One year later, Centennial was fourth nationally in based aircraft. In 1995, Centennial was the second busiest general aviation airport in the country.

approximately 1,200 acres of land in Arapahoe and Douglas Counties. In 1975, Arapahoe County established the Authority pursuant to the Public Airport Authority Law, sections 41-3-101 to -108, 17 C.R.S. (1973), to own and operate Centennial as a political subdivision of the State. The Authority owns all of the land and facilities at Centennial except for two runways which it leases from Arapahoe County.

To fund airport construction and operations, the Authority has accepted approximately $30.1 million in federal grants. As a condition to accepting these grants and pursuant to federal law, the Authority has given its assurance that it "will make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and classes of aeronautical uses." A separate assurance provides that the Authority "may prohibit or limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public."

Local, regional, and national planning schemes designate Centennial as a general aviation reliever airport for Denver's primary air carrier airports, Stapleton International (Stapleton), which closed in February of 1995 and Denver International (DIA), which opened upon Stapleton's closure. Locally, resolutions passed by the Board of County Commissioners of Arapahoe County in 1966 approved funding for the construction of a general aviation airport. Newspaper accounts of open meetings held following this funding approval indicate that county officials hoped to lure new industry and expand the county's tax base by building an airport to "serve general aviation,

not scheduled carriers or military planes." A new airport would also ease general aviation overcrowding at Stapleton. In one news report, the Federal Aviation Administration (FAA) area director proclaimed that the airport was "a much needed reliever terminal for general aviation."

Regionally, the Denver Regional Council of Governments (DRCOG), a planning organization of county and municipal governments, has adopted several aviation plans that guide the development and operation of airports in the Denver area. Specifically, the 2010 Regional Aviation System Plan (2010 Plan), which was published by DRCOG in 1989, provides that Stapleton is the only commercial air carrier airport in the region and designates Centennial "as a non-commercial passenger, transport-category, general aviation reliever airport." Similarly, the Regional Aviation System Planning Program Data File, which was published by DRCOG in 1991, provides that Stapleton is the "air carrier facility for the Denver region" and categorizes Centennial "as a non-commercial passenger, transport category, G.A. reliever."[2]

Nationally, the National Plan of Integrated Airport Systems (NPIAS), which was presented to Congress by the Secretary of Transportation in 1991, does not include Centennial in its summary of Colorado's primary and

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[2] In November of 1995, after the facts giving rise to this dispute arose, DRCOG published the 2020 Regional Aviation System Plan (2020 Plan) to update the 2010 Plan. The 2020 Plan refers to Centennial as a "transport-category, general aviation airport, [that] is a designated reliever to DIA."

commercial service airports. Instead, the NPIAS lists Centennial as a reliever airport intended to alleviate general aviation congestion at Denver's primary commercial airport through 1999.

Due to its planned role as a general aviation reliever and strong opposition from citizens who live near the airport, scheduled passenger service has never been authorized at Centennial. While fixed-base air taxi and charter flights are permitted, Centennial's master plan, which was published in 1981, provides that air taxi, charter flights, and military use constitute less than one percent of the airport's total operations. Because scheduled passenger service has never been permitted, Centennial presently operates without a terminal, baggage system, or passenger security system.

Despite Centennial's lack of facilities, private efforts have been made to bring scheduled passenger service to the airport. In response, the Authority has increased efforts to prohibit scheduled passenger service. On July 21, 1993, the Authority sent a letter to the United States Department of Transportation (USDOT) asserting that the Authority did not have to approve applications for scheduled passenger service and asking USDOT for its opinion on the issue. On September 4, 1993, the Authority also amended the "Minimum Standards for Commercial Aeronautical Activities" (the Standards) governing operations at Centennial. These Standards now define "Airport Purpose" as

> any Authority action, undertaking or development that is consistent in maintaining the noncertificated status of the Airport and in preserving the Airport funding category as a "Reliever

> Airport" serving general aviation users. *Under no circumstances shall the Airport Purpose include scheduled passenger services.*

(Emphasis added.)

On December 20, 1994, Centennial Express began scheduled passenger service out of Centennial to Dalhart, Texas. Centennial Express has a valid air carrier certificate issued by the FAA.[3] At the time of its maiden flight, Centennial Express was aware of the Authority's ban on scheduled passenger service but chose to delay notifying the Authority until the return flight from Dalhart. Centennial Express also issued a press release announcing that it would soon provide scheduled passenger service from Centennial to Amarillo, Colorado Springs, Grand Junction, and other Western Slope airports in 1995. Additionally, Centennial Express planned to begin regular jet flights from Colorado Springs to Chicago, Kansas City, Houston, Dallas, Phoenix, Los Angeles, San Francisco, and Seattle.

The following day, the Authority filed suit in Arapahoe County District Court (the district court) seeking a temporary restraining order and preliminary and permanent injunctions preventing Centennial Express from conducting scheduled passenger service out of Centennial. On December 22, 1994, the district court granted the Authority's request for a temporary restraining order, concluding in part that

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[3] The FAA certificate authorized Centennial Express to carry up to 30 passengers for four scheduled round trips per week, per destination, in aircraft weighing less than 75,000 pounds.

> [r]eal, immediate, and irreparable injury may be prevented if [Centennial Express is] enjoined from conducting and expanding illegal scheduled passenger service at the Airport. [Centennial Express has] made a unilateral decision to conduct illegal scheduled passenger service at the Airport. [Centennial Express has] flaunted the law by disregarding the Airport's Minimum Standards. [The Authority] manages the Airport. Indeed, [the Authority's] reason to exist turns on its ability to govern and manage the Airport. If the requested relief is not provided, [the Authority] will be stripped of its ability and authority to manage the Airport.

On December 23, 1994, more than seventeen months after the Authority's initial request, USDOT responded to the Authority's letter as to whether it could ban scheduled passenger service at Centennial. In relevant part, the USDOT's letter provides as follows:

> In addressing similar cases in the past, FAA has found it arbitrary to exclude any particular class of service due to factors that are not related to the impacts of that service.
>
> Although the material that [the Authority] submitted states that approval of scheduled service would increase the number of operations and passengers at Centennial Airport, there was insufficient information submitted with [the Authority's] letter to demonstrate that a restriction of any particular category of operation could be adequately supported. For example, although individual factors are not alone likely to be dispositive, [the Authority's] letter does not discuss the nature and extent of any resulting environmental impact, congestion, or effect

> on airport facilities such as the terminal or parking, that would result from the initiation of scheduled service.

Later, the opinion letter states that the Authority's letter also raises a policy issue relating to how to harmonize several important goals – allowing the citizens of a region to plan and manage their aviation resources on a regional basis, while at the same time preserving and enhancing the performance of the national aviation system and ensuring that statutory and regulatory requirements associated with use of federal grant funds are not violated. . . . We firmly support regional planning and decision-making and strongly believe that local governments should, wherever possible, plan, develop and operate their transportation systems in an integrated and regional context, consistent with applicable federal law. . . .

[W]here the volume of air traffic is approaching or exceeding the maximum practical capacity of an airport, an airport owner may designate a certain airport in a multiple airport system (under the same ownership and serving the same community) for use by a particular class of aircraft so long as the owner can assure that all classes of aeronautical needs can be fully accommodated within the system of airports under the owner's control. . . .

The issue that this raises is whether [USDOT] should change its policy to extend the flexibility now afforded to multiple airports under joint ownership to individually-owned multiple airports which are planned and operated under a regional agreement. . . . Because this would be a significant policy change, full consideration by the public and the aviation community is warranted. Therefore, we

will be initiating, early next year, a process to obtain a full range of views on this issue.

On January 10, 1995, after conducting several hearings, the district court entered a permanent injunction prohibiting Centennial Express from conducting scheduled passenger service out of Centennial.[4] Centennial Express appealed and also filed a complaint with the Federal Aviation Administration (FAA).[5] The court of appeals reversed the district court's ruling, concluding that the Authority's regulation prohibiting scheduled passenger service was preempted by 49 U.S.C. § 41713(b)(1) (1994). The court of appeals also held that the district court should have left the question of whether the Authority could prohibit scheduled passenger service to the federal administrative agencies' primary jurisdiction.

II.

At the outset, we must determine whether this court should defer to the federal agencies' holding concurrent jurisdiction over this case. The doctrine of primary jurisdiction, or the deference doctrine, calls for judicial deference in cases involving technical questions of fact uniquely within an agency's expertise and experience, or

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[4] At a January 5, 1995, hearing, the parties stipulated that the district court would rule on the issue of permanent injunctive relief in order to expedite this case for appeal. For this reason, no preliminary injunction was issued in this case.

[5] Centennial Express's FAA complaint was the second challenging the Authority's ban on scheduled passenger service. The first complaint had been filed by an individual who is not a party to this action. Both complaints are still pending.

in cases where uniformity and consistency require administrative discretion. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976); *Columbia Gas Transmission Corp. v. Allied Chem. Corp.*, 652 F.2d 503, 519 n.14 (5th Cir. 1981); *Great Western Sugar Co. v. Northern Natural Gas Co.*, 661 P.2d 684, 690 (Colo. App. 1982). No fixed formula exists for deciding when to invoke this doctrine, but it should be utilized reluctantly where the issue is strictly a legal one that is within the conventional competence of the courts. *See Great Western Sugar,* 661 P.2d at 690.

The issues in this case do not involve complex questions of fact. Rather, we have been asked to consider whether the district court properly enjoined Centennial Express from conducting scheduled passenger service out of Centennial. As defenses, Centennial Express claims that (1) the Authority's regulation prohibiting scheduled passenger service at Centennial is preempted by federal law and (2) the ban on scheduled passenger service violates the terms of the Authority's federal grant assurances. In our view, these legal and interpretive questions do not "go beyond the understanding of judges" or lay "at the heart of the task assigned the agency by Congress." *See Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580-81 (1st Cir. 1979).

Additionally, the FAA has yet to rule on either of the complaints despite the fact that they were filed more than three years ago. Similarly, although the USDOT opinion letter alludes to "initiating, early [in 1995], a process to obtain a full range of views on" its policy regarding individual airport participation in regional airport planning, we have no indication from the parties or USDOT that such efforts have begun. Because there is a strong

public interest in resolving this case promptly, we refuse to defer to administrative action which is of "uncertain aid and uncertain speed." *See id.* at 581.[6]

Centennial Express also points to the USDOT opinion letter in arguing that deference is warranted in this case. In *Banner Advertising, Inc. v. People*, 868 P.2d 1077, 1083 (Colo. 1994), we addressed the level of deference we must afford an opinion letter issued by the FAA. Specifically, we explained:

> [T]he opinion of the FAA's chief counsel . . . was not reached as a result of hearing adversary proceedings in which he found facts and reached conclusions of law. It is in no way binding on a court. Nevertheless, the letter was written as part of the official duties of the chief counsel, and is based on a level of more specialized expertise than most judges possess, so we may properly look to it for guidance. While

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[6] Contrary to the court of appeals, we do not view *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 171 (1st Cir. 1989), as dispos..ive here. In that case, the Second Circuit held that the district court erred in ruling on the merits of a case involving the imposition of landing fees at Boston's Logan Airport when the same issue was pending before the FAA. In the Second Circuit's view, the following federal actions, in addition to an FAA complaint, justified deferring to the FAA in that case: (1) the Secretary of Transportation had ordered a formal investigation into the complaint; and (2) the United States, as *amicus curiae*, had urged the district court to issue an injunction preserving the status quo until the USDOT's investigation was complete. *See id.* In this case, we are aware of no formal investigation into the FAA complaints and have received no indication from the federal government that reviewing the merits of this case is, in its view, inappropriate.

> opinion letters from administrative agencies are not binding authority, they can be used as persuasive authority.

Id. Contrary to *Banner,* where we chose to defer to the agency's letter, we believe the USDOT's opinion letter in this case does not require deference. First, the letter is brief, contains no federal preemption analysis, and fails to cite any federal cases for its propositions. Second, the letter is inconclusive because it states that the Authority submitted "insufficient information" on the impact scheduled passenger service would have at Centennial. Third, because the opinion letter is only persuasive authority, it is not binding on this court. *See id.*

In this case, Centennial Express began scheduled passenger service in clear defiance of the Authority's regulations, before the USDOT's opinion letter was issued, and before filing its FAA complaint. Nevertheless, Centennial Express asserts that even though it has disregarded valid regulations passed pursuant to state law, we must defer to the federal agencies' concurrent jurisdiction. We disagree. If we defer to the federal agencies, we would affirm Centennial Express's course of conduct and foreclose the Authority's only avenue of relief. This would allow future airport users to unilaterally conduct and continue operations in violation of airport rules so long as they implicate federal jurisdiction in some way. Under these circumstances, we refuse to defer to the federal agencies' concurrent jurisdiction.

III.

Centennial Express argues that the ban on scheduled passenger service is preempted by federal law. We disagree.

Congress radically altered the character of commercial aviation when it amended the Federal Aviation Act and deregulated the airline industry pursuant to the Airline Deregulation Act of 1978 (ADA). *See* Pub. L. 95-504, 92 Stat. 1705. In so doing, Congress determined that market forces were better suited for promoting efficiency, innovation, low prices, variety, and quality in the air transportation industry. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). However, the absence of federal regulation caused concern in Congress that individual states would pass inconsistent and conflicting laws regulating the airline industry. *See* H.R. Rep. 95-1211, at 15-16 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3737, 3752; *see also Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 320-21 (E.D. Mich. 1993). Consequently, the ADA included a provision that preempted all state laws relating to the rates, routes, or services of an interstate air carrier. *See* 49 U.S.C. § 1305(a)(1) (Supp. III 1979). Currently, 49 U.S.C. § 41713(b)(1) (the ADA preemption provision) provides that a political subdivision of a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[7]

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[7] Congress reenacted Title 49 in 1994. Previously, 49 U.S.C. § 1305(a)(1) provided in relevant part that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates,

Two cases from the United States Supreme Court offer guidance on the scope of the ADA preemption provision. In *Morales*, several airlines filed suit against the State of Texas seeking injunctive relief prohibiting enforcement of state regulations pertaining to airline fare advertising. The airlines argued that the regulations were preempted by the ADA preemption provision. Relying upon cases in which the Supreme Court interpreted a similarly worded preemption provision in the Employee Retirement Income Security Act of 1974 (ERISA), the Court determined that the ADA preemption provision expressed a broad preemptive purpose that included all "State enforcement actions having a connection with or reference to airline rates, routes, or services." *Morales*, 504 U.S. at 383-84; *see also American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995). The *Morales* Court noted, however, that preemption was inappropriate where the state action affects airline rates, routes, and services "in too tenuous, remote, or peripheral a manner." *See Morales*, 504 U.S. at 390; *Wolens*, 513 U.S. at 224.

In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 654-56 (1995), the Supreme Court explained that it may have interpreted

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routes, or services of any carrier." Although the language of this statute differs slightly from 49 U.S.C. § 41713(b)(1), Congress intended the revision to make no substantive change. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995). Therefore, even though many of the cases cited in this opinion interpret 49 U.S.C. § 1305(a)(1), this opinion refers to both § 1305(a)(1) and § 41713(b)(1) as the ADA preemption provision.

the "relate to" language in prior ERISA cases too broadly.[8]

Specifically, the Court explained:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase "relate to" does not give us much help drawing the line here.

Id. at 655 (citation and internal quotation marks omitted). Instead, the Court explained that it must address ERISA preemption cases "with the starting presumption that Congress does not intend to supplant state law." *Id.* at 654. With this presumption in mind, the Court then explained that it "simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term,

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[8] Although *Travelers* does not concern aviation law, *Morales* explains the connection to ERISA cases as follows:

> [W]e have held that a state law relates to an employee benefit plan, and is pre-empted by ERISA, if it has a connection with, or reference to, such a plan. Since the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here.

Morales, 504 U.S. at 384 (citation and quotation marks omitted). *Travelers* is therefore highly instructive on the Supreme Court's current approach towards interpreting "identical" language in the ADA preemption provision. *Id.*

and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Id.* at 656.

Despite the broad reach the *Morales* Court gave the ADA preemption provision, the *Travelers* decision establishes a less literal method for determining whether state regulations concerning aviation are preempted. Specifically, *Travelers* counsels that we should first presume "that Congress does not intend to supplant state law." *Id.* at 654. Then, we must review the objectives of the statute in defining "the scope of the state law that Congress understood would survive." *Id.* at 656.

Turning to the facts of this case, we believe that the Authority's ban on scheduled passenger service is not preempted. Because the regulation concerns an area of local and regional planning, it will not lead to inconsistent or conflicting state regulations.[9] Therefore, the

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[9] Besides planning Centennial's operations on a local level, the Authority's ban on scheduled passenger service also reflects the airport's regional role as a general aviation reliever for Denver's primary commercial airport. Other federal statutes indicate a willingness to cooperate with and defer to this type of local and regional aviation planning. *See* 49 U.S.C. § 40101(a)(8) (1994); 49 U.S.C. § 47101(g) (1994). Specifically, 49 U.S.C. § 47101(g) provides in pertinent part that

> the Secretary of Transportation shall cooperate with State and local officials in developing airport plans and programs that are based on overall transportation needs. The airport plans and programs shall be developed in coordination with other transportation planning and considering comprehensive long-range land-use plans and overall social, economic, environmental, system

regulation does not undermine the purpose of the ADA preemption provision.

The Authority's regulatory ban on scheduled service also survives scrutiny under the plain meaning of the ADA preemption provision because it does not regulate the manner in which airport users conduct their business. We disagree with the court of appeals that prohibiting scheduled passenger service "relates to" airline services because it does not concern typical service-oriented tasks such as ticketing, boarding procedures, providing meals and drinks to passengers, and baggage handling. *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995). Similarly, the Authority is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge or where they can fly.

While Centennial Express has raised preemption as a defense to the Authority's ban on scheduled passenger

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> performance, and energy conservation objectives. The process of developing airport plans and programs shall be continuing, cooperative, and comprehensive to the degree appropriate to the complexity of the transportation problems.

Without any indication that Congress intended to disregard local and regional aviation planning altogether, preemption is unwarranted in this case. *See Local 926, Int'l Union of Operating Eng'rs, AFL-CIO v. Jones*, 460 U.S. 669, 676 (1983) (explaining that "in the absence of compelling congressional direction," preemption is unwarranted when "the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that . . . it could not be inferred that Congress intended to deprive the State of the power to act").

service, we believe the Authority's actions more appropriately fall under 49 U.S.C. § 41713(b)(3) (1994) (the proprietor's exception), which provides conclusive support for the Authority's position. That section provides that the ADA preemption provision does not limit a political subdivision that owns or operates an airport "from carrying out its proprietary powers and rights."[10]

Federal courts have considered the scope of the proprietor's exception in two significant areas of airport management. The first, and most extensive, of these areas concerns an airport proprietor's ability to regulate airport noise. These cases hold that because they may be held liable for excessive noise, airport proprietors may restrict aircraft operations to accommodate permissible noise levels under the proprietor's exception. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 (1973); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981); *British Airways Bd. v. Port Auth. of New York*, 558 F.2d 75, 84 (2d Cir. 1977).

The second area of airport management that has been deemed to fall under the proprietor's control are perimeter rules, which restrict a commercial flight's maximum radius in order to limit an airport's ground congestion and divert long-haul traffic to other regional airports. *See City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184,

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[10] For purposes of applying the proprietor's exception, a proprietor has been defined as one possessing or controlling ownership, operation, promotion, and the ability to acquire necessary approach easements. *See San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981). Clearly, the Authority is Centennial's proprietor under this definition.

1196 (5th Cir. 1982); *Western Air Lines, Inc. v. Port Auth. of New York & New Jersey*, 658 F. Supp. 952, 958 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987). In contrast to cases affirming noise restrictions, these cases uphold perimeter rules even though they have no relationship to an airport's liability exposure. As one of these courts has reasoned,

> although questions of permissible noise regulation predominate in the courts, other proprietor-imposed regulations are presently accepted as valid exercises of proprietary powers. A proprietor's interest in regulating ground congestion at its airports would appear to be at the core of the proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor . . . to allocate air traffic in its three airport system is important to the advancement of this interest.

Western Air Lines, 658 F. Supp. at 957 (internal quotation marks omitted).

There are no cases that address the specific question posed by the present case. Nevertheless, we believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception. While regulations concerning aircraft noise and ground congestion restrict the manner in which airport users conduct their operations, a ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of permissible operations at the airport. The power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or

even contemplated. *See id.; see also Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986) (finding that, under the proprietor's exception, a municipality could prevent a seasonal operator from expanding its operations to include year-round service).

By unilaterally commencing scheduled passenger service out of Centennial, Centennial Express has essentially proclaimed that the Authority, a political subdivision of the state, lacks the power to define and limit the scope of permissible operations at its airport. However, Colorado law clearly gives the Authority this power. *See* § 41-3-106(1)(h), 11 C.R.S. (1997).[11]

Accordingly, the Authority's ban on scheduled passenger service is a valid exercise of its proprietary powers that is not preempted by federal law.

IV.

Centennial Express also argues that the Authority has violated the terms of the federal grant assurances under which it has agreed to "make its airport available as an airport for public use on fair and reasonable terms and without unjust discrimination, to all types, kinds, and

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[11] Section 41-3-106(1)(h) provides in part that the Authority has the power

> to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport, landing field, and navigation facilities . . . and to exercise such powers as may be required or consistent with the promotion of aeronautics and the furtherance of commerce and navigation by air[.]

classes of aeronautical uses." *See* 49 U.S.C. § 47107(a) (1994) (providing that project grant application may be approved only if Secretary of Transportation receives satisfactory written assurances). We disagree.

While the grant assurances prohibit discrimination among different types, kinds, and classes of aeronautical uses, we refuse to construe them so broadly that airport proprietors must accommodate every possible aeronautical use. By the terms of the assurances, an airport proprietor who has accepted federal funding must make its airport available on "fair and reasonable terms without unjust discrimination." The anti-discrimination provision therefore prohibits airport owners from using their proprietary power to grant one operator access while denying access to, or imposing unfair terms on, a similarly situated operator.[12] Here, the Authority is not discriminating against a particular operator because the ban on

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[12] In *City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015, 1029 (N.D. Tex. 1973), the court determined that it is discriminatory for an airport proprietor to ban scheduled passenger service in order to serve general aviation exclusively. However, we view that case as offering little support for Centennial Express's position. *City of Dallas* involved a completely different regulatory setting because that case was decided five years before deregulation fundamentally changed the manner in which airlines, and airports, conducted their operations. Further, *City of Dallas* concerned a ban enacted *after* that airport proprietor had previously allowed scheduled passenger operations at the airport. Therefore, facilities and procedures were already in place to accommodate scheduled passenger service. Such is not the case at Centennial, where scheduled passenger service has never been permitted.

scheduled passenger service applies to all airport users equally.

Furthermore, a separate assurance allows airport proprietors to prohibit specific aeronautical uses "if such action is necessary for the safe operation of the airport or necessary to service the civil aviation needs of the public." The Authority's ban on scheduled passenger service is necessary to ensure the safe operation of the airport. Although it initially plans to operate on a small scale, Centennial Express has ambitions to become much larger. Opening Centennial's doors to Centennial Express would also require the Authority to make Centennial available to other airlines who wish to provide scheduled passenger service. *See* 49 U.S.C. § 47107(a)(4) (1994). These new operators, some of whom may find conditions at Centennial more appealing than DIA, promise to bring increased aviation traffic to an already congested airport. This increased congestion is sure to have an impact on airport safety. Increased passenger traffic also requires additional facilities such as a terminal, security and baggage systems, which are currently lacking at Centennial. Without these facilities, the airport would become unsafe for passenger use.

Local, regional, and national aviation planning also strongly indicates that the aviation needs of the public are better served if Centennial continues to function as a general aviation reliever airport. The sudden imposition of scheduled passenger service and a resulting increase in commercial operations at Centennial would disrupt this planning scheme and force general aviation operators out of this valuable reliever airport. *See* 49 U.S.C. § 47102(18) (1994) (defining a "reliever airport" in part as an airport

designated "to provide more general aviation access to the overall community"). Currently, Centennial is congested and accommodates the majority of the region's general aviation demand while DIA continues to operate well below capacity.[13] A shift in commercial operations from DIA to Centennial would result in more of a disparity in the allocation of aircraft operations among the region's airports. *See City of Houston*, 679 F.2d at 1191.

The Authority's regulation prohibiting scheduled passenger service does not discriminate against individual airport users. Furthermore, the ban on scheduled passenger service "is necessary for the safe operation of the airport" and services "the civil aviation needs of the public." For these reasons, the Authority has not violated the terms of the federal grant assurances.

V.

The Authority, as the owner and operator of Centennial, has the power to enact regulations which prohibit scheduled passenger service at its airport. This regulatory ban is not preempted by federal law and does not violate the terms of grant assurances that the Authority has given to the federal government. We therefore hold that the district court properly enjoined Centennial Express from conducting scheduled passenger service out of Centennial. Accordingly, we reverse the court of appeals and

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[13] DRCOG's 2020 Plan explains that in 1995, DIA was "currently operating with five of the 12 planned runways and 87 of the planned 206 gates."

remand with directions to reinstate the district court's order.

JUSTICE SCOTT concurs and specially concurs.

JUSTICE BENDER dissents, and JUSTICE MARTINEZ joins in the dissent.

JUSTICE HOBBS does not participate.

JUSTICE SCOTT concurs and specially concurs:

We granted certiorari and ordered briefing by the parties regarding two questions:

(1) Whether a political subdivision of the State, which owns and operates a general aviation reliever airport, and which has never permitted scheduled passenger service, may prohibit scheduled passenger service under state and federal law.

(2) Whether a state court may determine the proprietary powers of a political subdivision of the State, which owns and operates a general aviation reliever airport, to ban scheduled passenger service.

In answer to the first question, like the majority, I conclude that a state political subdivision, Arapahoe County Public Airport Authority (the Authority), which owns and operates a general aviation reliever airport without a terminal and passenger security system, may prohibit scheduled passenger service. My response to the second question is predicated on the answer to the first: Yes, in order to effect a prohibition on scheduled passenger service and to protect its proprietary interests, the Authority may obtain the aid of our state courts.

I write separately, however, to make clear that, in my view, because the Federal Aviation Administration (FAA) has not acted, it is inappropriate at this time to conclude that any such prohibition by the Authority is preempted. Likewise, I believe it would not be proper or prudent to withhold judicial review on this record in light of the conduct of Centennial Express Airlines, Inc. (Centennial), or under the assumption the FAA will act.

Because I fail to see how the state injunction interferes with any agency action or otherwise exercises jurisdiction in excess of what is necessary to stay the actions of Centennial, which threaten the proprietary interests of a state agency, I find no error in the district court orders. Consequently, I join the opinion of Chief Justice Vollack to reverse the judgment of the court of appeals.

I.

State courts generally have concurrent jurisdiction with the federal courts to decide questions of federal law. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). I can see no reason why a state court's exercise of concurrent jurisdiction over a particular set of questions would be displaced because a party before the court subsequently initiates additional proceedings with a federal agency that has concurrent jurisdiction over those questions. Therefore, I have no trouble concluding that the district court had the power to decide both the state and federal questions necessary to resolve this case with injunctive orders issued on the merits.

II.

The claim raised by the Authority in the district court was based principally on state law. Indeed, few can question that the Authority plainly has the power to exclude scheduled passenger service from Centennial Airport, unless, of course, Congress preempts state laws permitting such a prohibition, *see* maj. op. at 13-14, 18-22; dissenting op. at 9 (Bender, J.); *see also Banner Advertising, Inc. v. People of the City of Boulder*, 868 P.2d 1077, 1080 (Colo. 1994), which Congress has not done.

In addition, preemption may occur pursuant to a federal statute authorizing the FAA, by formal agency action, to preempt state law. However, unless the FAA acts within its defined authority, no preemption results. It is uncontroverted that the FAA has not acted.[14]

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[14] For purposes of this opinion, I am willing to assume that the FAA has, by statutory grant, the power to preempt the Authority's regulations. Moreover, under the grant agreements, the FAA may also be able to prevent the Authority from barring scheduled passenger service pursuant to the various assurances or contract clauses under the terms of the grant agreement. *See* 14 C.F.R. § 16.1-16.307 (establishing rules of practice for complaints involving violations of FAA regulations and grant assurances). The FAA is obligated to enforce its grant agreements and, where necessary, to compel compliance by its various grant recipients. *See* 14 C.F.R. § 151.7(a) (providing that FAA may authorize grant funding only where the FAA administrator is satisfied grant assurances have been or will be met). Hence, the FAA may attempt to invoke the assurances or contract clauses of the grant agreement as a bar to the Authority's actions based on a breach of contract theory. Of course, if the FAA is unable to enforce the grant agreements administratively or the Authority wishes to challenge the FAA action, the matter must be litigated in federal court because the

In that vacuum, on December 22, 1994, the district court first issued a temporary restraining order (temporary order). The temporary order was, by its terms, an order that "would preserve the status quo pending a trial on the merits." As the court explained, "[t]he status quo is that no scheduled passenger service is allowed at the Airport. . . . Granting [the] order would preserve the status quo." Thus, the court ordered Centennial "to refrain immediately from conducting and/or expanding scheduled passenger service at Centennial Airport."

Subsequently, the district court issued its Permanent Injunctive Order of January 10, 1995. However, as I read the court's order, it has self-imposed limitations worthy of note. Building upon the temporary order, the permanent injunction states that it "preserve[s] the status quo[,] no scheduled passenger service," and that it "PERMANENTLY ENJOINS [Centennial] . . . to *refrain immediately* from conducting scheduled passenger service at Centennial Airport *so long as such use is prohibited by the Minimum Standards* of the Arapahoe County Public Airport Authority." (Emphasis added.)

Here, in the absence of FAA action, the Minimum Standards of the Arapahoe County Public Airport Authority

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United States would be a party. Notwithstanding the assurances under the grant agreement, in the event a grantee violates FAA regulations, the agency might also commence an enforcement proceeding under the FAA's other regulations. Nonetheless, the limiting factor in any preemption analysis here is the failure of the FAA to act and the fact no party has turned to the federal courts to compel FAA action.

continue to prohibit scheduled passenger service. I therefore agree that, under these circumstances, the district court did not err when it issued its injunction barring Centennial from conducting scheduled passenger flights based on the state law grounds urged by the Authority.

Consistent with our holding today, we have previously recognized that even where a court does *not* have jurisdiction to decide a controversy on the merits, it may nonetheless issue an injunction to preserve the status quo pending resolution of the dispute in an appropriate forum. *See Hughley v. Rocky Mtn. Health Maintenance Organization, Inc.*, 927 P.2d 1325, 1330 (Colo. 1996) (court may enter injunction to preserve status quo despite statutory divestiture of jurisdiction over merits of dispute submitted to arbitration); *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. District Court*, 672 P.2d 1015, 1018-19 (Colo. 1983) (same).

In my view, there can be little question as to whether the district court had jurisdiction over the state law issue and was obligated to exercise the state judicial power. Our constitution does not contemplate that a trial court can, as executive departments of government may, avoid a matter properly before it solely by exercise of its discretion. Colo. Const. Art. II, § 6. ("Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.") As the United States Supreme Court held in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821):

We cannot pass [a case] by because it is doubtful. With whatever doubts, with whatever difficulties, a case may

be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

III.

In sum, an injunction was appropriate to protect the proprietary interests of the Authority. Therefore, I too would reverse the judgment of the court of appeals. Accordingly, I join the majority in holding that the district court's order enjoining Centennial to preserve the status quo was appropriate to resolve the dispute before that court.

JUSTICE BENDER dissenting:

The majority holds that the Arapahoe County Airport Authority's (Authority) ban on scheduled passenger service is not preempted by 49 U.S.C. § 41713(b)(1) (1994) because the ban does not relate to rates, routes, or services. *See* maj. op. at 19. The majority also determines that the ban is not preempted because it falls within the proprietary powers exception to preemption set forth in 49 U.S.C. § 41713(b)(3) (1994), and that the ban is valid because it does not violate federal funding regulations. *See id.* at 19, 22. The majority reasons that the district court's exercise of jurisdiction in this case is appropriate because the state court system need not defer to the Federal Aviation Administration (FAA) of the Department of Transportation (DOT) regarding the applicability

of the proprietary powers exception and the validity of this state regulation under federal funding requirements. *See id.* at 13.

I agree with the court of appeals' decision that the Authority's ban on scheduled passenger service is preempted by federal law, and that the applicability of the proprietary powers exception to the preemption statute should be determined by the FAA in keeping with the doctrine of primary jurisdiction. I would additionally hold that the state court system should defer to the FAA on the allegations of federal funding violations.Therefore, I believe the court of appeals was correct to reverse the injunction entered by the district court. While I agree with the majority that state courts and the FAA possess concurrent jurisdiction over the applicability of the proprietary powers exception and the question of whether the Authority's ban violates federal grant assurances, I would not address either issue and would defer to the FAA because both issues present important policy considerations properly resolved by a federal administrative agency. In addition, the exercise of jurisdiction by our state court system involves a high risk of inconsistent results between our state system and the federal administrative forum. Thus, I would affirm the decision of the court of appeals, and I respectfully dissent from the majority opinion.

I.

Centennial Airport was founded in 1967. Construction of the airport was made possible by $30.1 million in federal grants given in exchange for the Authority's assurances

that "the airport will be available for public use on reasonable conditions and without unjust discrimination," 49 U.S.C. § 47107(a)(1) (1994), and that the airport would be "open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes . . . [unless] such action is necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public." 14 C.F.R. § 152, app. D, ¶ 18 (1997). Use of the airport is governed by state and federal law and by regulations promulgated by the Authority. Because the Authority is a political subdivision of the state, these regulations, entitled "Minimum Standards for Commercial Aeronautical Activities" ("Minimum Standards"), have the force and effect of state law. *See* § 41-3-102, 11 C.R.S. (1997) (the Authority is a political subdivision of the state); *cf.* § 41-3-106(1)(h), 11 C.R.S. (1997) (conferring power to regulate certain airport activities).

The airport was designed as a general aviation airport and therefore lacks the facilities associated with commercial passenger air transport, such as a terminal or baggage system. Nonetheless, the Authority historically has allowed certain types of passenger services – unscheduled passenger services – at the airport. Unscheduled passenger services are those in which the flight times and destinations are not offered to the public in advance. *Cf.* 14 C.F.R. § 119.3 (1997) ("defining scheduled passenger service").[15] Instead, unscheduled

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[15] Although the Code of Federal Regulations does not define "unscheduled operations," a "scheduled operation" is defined as follows:

passenger services allow an individual to contact the airline and arrange for private transportation, but at a high price. Examples of unscheduled passenger services include air taxis and charter flights. Many of the companies offering unscheduled passenger services at Centennial Airport operate pursuant to a "Part 135" air carrier certificate[16] issued by the FAA. A Part 135 air carrier certificate authorizes the use of airplanes that have up to thirty seats and weigh no more than 75,000 pounds when fully loaded. *See id.* A Part 135 certificate allows an operator to conduct unlimited unscheduled passenger services but limits an operator to conduct no more than four scheduled round trips per week on at least one route between two or more points. *See id.* The

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> [A]ny common carriage passenger-carrying operation for compensation or hire conducted by an air carrier or commercial operator for which the certificate holder or its representative offers in advance the departure location, departure time, and arrival location.

14 C.F.R. § 119.3 (1997). Hence, an unscheduled service is a similar operation that does not offer flight information in advance. "Common carriage" is a service using aircraft with 30 or fewer seats that weighs no more than 75,000 pounds. *See id.* A "passenger-carrying operation" is a service that provides less than five round trips per week on at least one route between two or more points. *See id.*

[16] 14 C.F.R. pt. 135 (1997) is commonly known as Part 135. An operation conducted pursuant to a Part 135 air carrier certificate is restricted to certain types of aircraft as set forth in Part 119. There are numerous other Part 135 air carriers at Centennial Airport. Some of these carriers are operating under an air carrier certificate identical to the one the FAA issued to Centennial Express.

Authority permits many other commercial activities, including air cargo, commercial flying clubs, flight training, and sightseeing tours.

Various parties sought the Authority's permission to initiate scheduled passenger service at Centennial Airport and were denied. On July 21, 1993, the Authority sent a letter to the DOT requesting the DOT's opinion on whether the Authority could deny applications for scheduled passenger service without violating federal law. In September of 1994, the Authority amended the Minimum Standards to prohibit scheduled passenger service.[17]

Shortly thereafter, the DOT mailed a letter to the Authority in response to the Authority's inquiries. In this letter, the FAA stated that although the information provided by the Authority was not sufficient to allow the FAA to reach a conclusive determination, the exclusion of a particular class of service, such as the Authority's ban on scheduled passenger service, is generally arbitrary and invalid. The FAA then stated that the Authority's ban on scheduled passenger service raised important policy

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[17] The amended version of the Minimum Standards provides, in pertinent part:

> An Air Carrier operator is an entity that provides scheduled passenger services and operates under the appropriate [federal aviation regulations] . . . with aircraft that provide no more than 30 passenger seats and are within the weight limitations established for the Airport in its Rules and Regulations. (*This category is not consistent with the Airport Purpose and will not be allowed to operate at the Airport unless required by final court order.*)

(Emphasis in original.)

questions regarding harmonizing regional planning with national aviation requirements, and that the FAA would commence a proceeding to "obtain a full range of views on this issue."

Centennial Express operates charter services out of Centennial Airport under an agreement with the Authority in which Centennial Express agreed to use the airfield in accordance with state and federal law and in conformity with the Minimum Standards. On December 20, 1994, Centennial Express obtained a Part 135 air carrier certificate from the FAA. The air carrier certificate authorized Centennial Express to provide scheduled passenger services in the contiguous United States, Alaska, Canada, and Mexico. The certificate further authorized Centennial Express to carry up to thirty passengers for four scheduled round trips per week, per destination. The same day, Centennial Express, acting unilaterally, began its FAA-approved scheduled passenger service on its King Air aircraft,[18] with routes including service to Centennial Airport.

Upon learning that Centennial Express was conducting scheduled passenger service in violation of the Minimum Standards, the Authority filed suit against Centennial Express in district court. The Authority sought a permanent injunction prohibiting Centennial Express from providing scheduled passenger service at Centennial Airport.

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[18] The King Air aircraft is quieter than a number of other aircraft currently in use at the airport. There are at least twenty planes operating out of the airport similar to those used by Centennial Express.

Centennial Express raised several affirmative defenses. It argued that the Authority's prohibition on scheduled passenger service was not valid because the ban violated the Authority's grant agreements with the federal government by discriminating unjustly between classes of airport users. In its view the Authority's ban discriminated against scheduled passenger service because the Authority permitted unscheduled passenger services in the form of

> charter service, air cargo service, corporate jet service, private aircraft of all sizes and kinds, planes noisier than Centennial Express planes, or planes identical to or larger than Centennial Express planes. [The Authority] does not seek to exclude all holders of Part 135 air carrier certificates, the certificate held by Centennial Express. [The Authority] does not seek to prohibit the frequency of any kind of flight in and out of the Airport, but merely seeks to discriminate against scheduled passenger service.

Additionally, Centennial Express argued that the ban was unenforceable because it was preempted by 49 U.S.C. § 41713(b)(1), which provides in pertinent part:

> *Preemption.* (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

The Authority countered that the prohibition on scheduled passenger service was not preempted by 49 U.S.C.

§ 41713(b)(1) because subsection (3) of the same statute contains an exception that allows airport proprietors to promulgate regulations necessary to protect their rights as proprietors. Subsection (3) provides:

> This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

49 U.S.C. § 41713(b)(3). Centennial Express argued that the proprietary powers exception did not apply because this exception is narrow and does not permit a proprietor to enact discriminatory regulations in direct conflict with federal anti-discrimination requirements.

The district court determined that Centennial Express's operation of scheduled passenger service violated the Minimum Standards. The district court rejected the affirmative defenses raised by Centennial Express, stating that the ban did not constitute unjust discrimination under the federal grant agreements and that the ban was not preempted because it was within the scope of the Authority's proprietary powers.

Centennial Express filed a formal complaint against the Authority with the FAA, alleging that the Authority's ban on scheduled passenger service is invalid because it is discriminatory, in violation of federal funding regulations.[19] Centennial Express also appealed to the court of

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[19] To date, the formal complaint is still pending before the FAA.

appeals. The court of appeals reversed, holding that the prohibition was preempted by 49 U.S.C. § 41713(b)(1) and that the applicability of the proprietor's rights exception contained in 49 U.S.C. § 41713(b)(3) was a matter that must be determined by the FAA rather than the state courts. The court of appeals did not address the issue of federal funding. The Authority then petitioned this court for certiorari review.

II. Preemption

The majority holds that the Authority's ban on scheduled passenger service is enforceable because the ban does not fall within the scope of the express preemption statute, 49 U.S.C. § 41713(b)(1). *See* maj. op. at 18. I disagree.

The Supremacy Clause of the United States Constitution authorizes Congress to enact legislation that preempts state law. *See* U.S. Const. art. VI, cl. 2. Preemption occurs in one of three ways: by express terms, by implication when Congress regulates an area in a comprehensive fashion, or by a conflict between federal and state law. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995).

In 1978, Congress enacted the Airline Deregulation Act ("ADA") which largely deregulated domestic air transport. "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier.' " *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992).

In *Morales,* the United States Supreme Court explained that the phrase "relating to" should be interpreted broadly and that "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services' " are preempted. *Id.* at 384. For example, in *Morales,* the court held that state requirements on the airlines' advertisement of fares was preempted. The Court determined that the restrictions would have a significant impact on the airlines' ability to market their product, which in turn would have a significant impact on the fares the airlines charged. Thus, the restrictions "related to" rates and were preempted.

Similarly, the Authority's ban on scheduled passenger service at Centennial Airport significantly impacts the service that Centennial Express provides at the airport and the services available at Centennial Airport to the citizens of our state who wish to travel to the destinations that Centennial Express seeks to serve – Dalhart and Amarillo, Texas; Colorado Springs; and Grand Junction.

The policy underlying the ADA supports the view that the Authority's ban on scheduled passenger service is preempted. The ban is inconsistent with the ADA's goals of furthering "the availability of a variety of adequate, economic, efficient, and low-priced services," 49 U.S.C. § 40101(4) (1994), and "encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry." 49 U.S.C. § 40101(13) (1994).

The majority relies upon *Hodges v. Delta Airlines, Inc.,* 44 F.3d 334, 336 (5th Cir. 1995), for the proposition that the

ban does not relate to "services" because the definition of "services" provided by an airline does not include the transportation itself. *See* maj. op. at 18-19. I agree with the majority that *Hodges* is instructive in this case; however, I read *Hodges* to compel the opposite conclusion – that the transportation provided by an airline is a "service":

> Elements of the air carrier service . . . include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, *in addition to the transportation itself.*

Hodges, 44 F.3d at 336 (emphasis added); *see also Butcher v. City of Houston*, 813 F. Supp. 515, 517-18 (S.D. Tex. 1993).[20] Thus, I disagree with the majority's determination that transportation is not a "service" for purposes of 49 U.S.C. § 41713(b)(1).

The majority holds that the ban affects services in " 'too tenuous, remote, or peripheral a manner' to have preemptive effect." *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 (1983)). It is true that the phrase "relate to" has its limits. For example, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), the Supreme

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[20] The *Butcher* court stated:

> [O]ne can imagine the effect of different states requiring a certain frequency of airline service to certain of their cities, or mandating that airline service be nonstop between certain cities. . . . These kinds of "services" . . . are distinctively incident to the provision of airline service to the public and, just like rates and routes, are beyond the power of states to regulate or otherwise affect by local law.

Butcher, 813 F. Supp. at 517-18.

Court held the words "relate to" in the ERISA preemption provision did not displace a state regulation that required hospitals to assess a surcharge on certain patients. *Id.* at 661. The Court determined that the connection between the surcharge and ERISA benefit plans was too remote.

In my view, *Travelers* is not similar to the Authority's ban on scheduled passenger service at Centennial Airport because the ban on scheduled service substantially relates to the services offered by Centennial Express. This connection is significantly greater than the tenuous connection presented in *Travelers.* The Authority's ban is more analogous to the prohibition in *Morales,* which " 'plainly does not present a borderline question.' " *Morales,* 504 U.S. at 390 (quoting *Shaw,* 463 U.S. at 100); *see also American Airlines, Inc. v. Wolens,* 513 U.S. 219, 226 (1995) (stating that frequent flier programs unquestionably "related to" rates for purposes of 49 U.S.C. § 41713(b)(1)).

The Supreme Court instructs us to interpret the words "relate to" in 49 U.S.C. § 41713(b)(1) broadly. *See Morales,* 504 U.S. at 383-84 (citing numerous cases in which the court emphasized the broad scope of the phrase "relate to"). The majority's determination that the Authority's ban does not "relate to" services is inconsistent with this mandate. For the above reasons, I would hold that the Authority's ban on scheduled passenger service "relates to" services and is explicitly preempted by 49 U.S.C. § 41713(b)(1).

III. Doctrine of Primary Jurisdiction

The majority chooses to address the scope of the proprietary powers exception and Centennial Express's assertion that the Authority's ban is unenforceable because it conflicts with the Authority's federal funding assurances. The majority chooses not to defer to the FAA on these issues, in part because of the failure of the FAA to act promptly in this matter and Centennial Express's unilateral action of conducting scheduled passenger service in direct conflict with the Authority's Minimum Standards. I agree that the delay in the administrative forum and Centennial Express's violation of the Minimum Standards are regrettable and unfortunate. However, on balance, I believe this court should defer to the FAA's jurisdiction on both the proprietary powers question and the federal funding issue in keeping with the doctrine of primary jurisdiction.

The doctrine of primary jurisdiction, also known as the deference doctrine, is "a means of coordinating administrative and judicial machinery" to promote consistent decisions that reflect agency expertise. *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979). The doctrine does not determine the existence of jurisdiction. Instead, it "comes into play only when both the court and the agency have jurisdiction over at least portions of the dispute." *Id.* at 581 n.1. The issue "is one of harmony, efficiency, and prudence." *Id.*

In determining whether to defer to an agency, courts should examine three factors: "(1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was

required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." *Id.* at 580-81. Another consideration may be whether the agency has an established procedure designed to resolve particular kinds of disputes. *See id.* at 581.

Here, Centennial Express has filed a formal complaint with the FAA alleging that the Authority's ban on scheduled passenger services is discriminatory and therefore invalid under federal funding regulations. The state court system is confronted with the same question: whether the Authority's ban is non-discriminatory. This is because both the applicability of the proprietary powers exception and Centennial Express's federal funding argument depend on the determination of that question. *See Midway Airlines, Inc. v. County of Westchester,* 584 F. Supp. 436, 440-41 (S.D.N.Y. 1984) (airport regulations imposed pursuant to proprietary powers must be reasonable, non-arbitrary, and non-discriminatory); *City of Dallas v. Southwest Airlines Co.,* 371 F. Supp. 1015, 1028-29 (N.D. Tex. 1973) (an airport regulation that conflicts with federal non-discrimination requirements will not be upheld and is in violation of the federal funding assurances).[21] I agree

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[21] I question the majority's interpretation of the scope of the proprietary powers exception. The proprietary powers exception allows a publicly owned airport to take certain actions '–! its capacity as a proprietor that it could not take as a regulator under its police power. *See City of Burbank v. Lockheed Air Terminal Inc.,* 411 U.S. 624, 635 n.14 (1973). However, airport regulations imposed pursuant to proprietary powers must be reasonable, non-arbitrary, and non-discriminatory. *See Midway,* 584 F. Supp. at 440-41. The precise scope of the proprietary

with the majority that we possess concurrent jurisdiction with the FAA on whether the Authority's ban is non-discriminatory. *See County of Broome v. Commuter Airlines, Inc.*, 442 N.Y.S.2d 652, 654-55 (N.Y. App. Div. 1981) (stating that state courts have jurisdiction to determine the applicability of the proprietary powers exception); *City of Dallas*, 371 F. Supp. at 1028-29 (finding an airport proprietor in violation of federal funding requirements).

As I read the sparse precedent in this area, discrimination may occur not only within a class of aeronautical users, but also between classes of aeronautical users. *See City of Dallas*, 371 F. Supp. at 1031. In *City of Dallas*, the court held that prohibition of scheduled passenger service at an airport that permitted passenger charter flights impermissibly discriminated between classes of airport users. *See id.* In reaching this conclusion, the court stated:

> [C]harter flights carrying passengers for hire on an unscheduled basis will continue to operate out of Love Field. . . . [S]ome of the operations to remain at Love Field will use planes larger than Southwest's; some will use planes noisier than Southwest's; some will use planes identical to Southwest's. . . .
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powers exception is unsettled. *See Western Air Lines, Inc. v. Port Auth.*, 658 F. Supp. 952, 956 (S.D.N.Y. 1986). However, proprietary powers are extremely limited, *see City of Houston v. Federal Aviation Admin.*, 679 F.2d 1184, 1194 (5th Cir. 1982), and "have never been deemed broad enough to authorize a municipality to adopt regulations which are in direct conflict with FAA regulations." *Skydiving Ctr. of Greater Washington, D.C., Inc. v. St. Mary's County Airport Comm'n*, 823 F. Supp. 1273, 1283 (D. Md. 1993).

> . . . In place of the preference accorded mass transportation . . . Plaintiffs herein, in determining who shall have access to Love Field, have preferred private aircraft, corporate jets, unscheduled cargo flights, maintenance flights, and ferry flights over Southwest's commercial service. . . .
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> . . . Plaintiffs' unsystematic classification discriminates . . . between uses within the same general class. . . . Charter flights, which may use larger or smaller aircraft than Southwest Airlines, may remain at Love Field, while Southwest Airlines must go.

Id. at 1028, 1029, 1031; *see also Midway*, 584 F. Supp. at 440-41 (holding application for access to airport in abeyance was a valid exercise of proprietary powers because airport board was not banning a particular user from the airport, only asking for adequate time to formulate plans to allocate scarce resources).

The majority's discussion of proprietary powers fails to address the non-discrimination requirement of the proprietary powers doctrine. In a separate discussion dealing with the issue of whether the Authority is in violation of its grant assurances of non-discrimination, the majority states that "the Authority is not discriminating against a particular operator because the ban on scheduled passenger service applies to all airport users equally." Maj. op. at 23. In other words, the majority holds that the ban is not discriminatory because the Authority has never allowed scheduled passenger service at Centennial Airport. *See id.* at 23 n.12. The majority attempts to distinguish *City of Dallas* on the basis that the ban on scheduled

passenger services in that case prohibited operations previously allowed at the airport, while the Authority has never permitted unscheduled passenger services at Centennial Airport. *See id.* (discussing *City of Dallas*).

However, the rationale of the opinion in *City of Dallas* did not turn on the airport's previous consent to the operations they subsequently sought to prohibit. Rather, the critical holding of *City of Dallas* is that discrimination occurs not only within a class, but also between classes. *See City of Dallas*, 371 F. Supp. at 1031. Although it is accurate to say that the Authority's ban on scheduled passenger services applies equally to all airport users, this fact does not cure the discrimination occurring in this case when the Authority permits other carriers to provide unscheduled passenger services using similar planes, similar flight patterns, making the same or more noise, and carrying the same or greater number of passengers as Centennial Express would in providing scheduled passenger service, as our record here shows. Hence, even assuming that the Authority's ban on scheduled passenger service falls within the scope of the proprietary powers exception, 49 U.S.C. § 41713(b)(3), the Authority's ban on scheduled passenger service may be unenforceable because it impermissibly discriminates between classes of airport users.

Our record reflects that there are numerous other Part 135 air carriers – air carriers conducting similar flight operations using the similar aircraft and carrying the same number of passengers – at Centennial Airport. Some of these carriers are operating under an air carrier certificate identical to the one that the FAA issued to Centennial

Express. With respect to noise, the King Air aircraft operated by Centennial Express is quieter than a number of other aircraft currently in use at the airport, and there are at least twenty planes operating out of the airport similar to those used by Centennial Express. The only difference between these services and those offered by Centennial Express is that Centennial Express makes its rates and destinations known to the public in advance.

Complicating matters further, the Authority's ban appears to be contrary to the purpose of a public airport – operation "for the use and benefit of the public . . . open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes." 14 C.F.R. § 152, app. D, ¶ 18 (1997). Absent extraordinary circumstances, a public airport, such as Centennial Airport, should not be permitted to cater to special private interests, i.e., those individuals and corporations possessing the financial resources to either own aircraft or pay the high cost of charter flights. In addition, the Authority's ban may run afoul of the FAA's long-standing policy in favor of mass-transportation over private aircraft. *See City of Dallas*, 371 F. Supp. at 1029 ("Since commercial aviation represents the right of a greater number of people to use the navigable airspace of the United States, implementation of the Congressional policy requires a preference for commercial aircraft over private aircraft (and by implication over air cargo).").

Although other courts have discussed the definition of "discrimination" in the context of aeronautical operations,[22] whether this ban constitutes impermissible discrimination presents a complex and troublesome question because the FAA indicated in its informal letter to the Authority that it may change its policies to allow the proprietor of a single airport to discriminate against classes of users so long as the proprietor adheres to a regional plan which, as a whole, satisfies federal anti-discrimination requirements.

Turning to the three-part test articulated in *Mashpee Tribe*, I would hold that the question of whether the ban is non-discriminatory lays at the heart of the task assigned to the FAA by Congress. The determination of this question requires statutory interpretation of the ADA, particularly with respect to the proprietary powers issue because the facts present a matter of first impression regarding the scope of 49 U.S.C. § 41713(b)(3). Interpretation of the ADA is a task assigned to the FAA by Congress. *See Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1215 (Colo. 1996) (stating that an agency is charged with the administration and enforcement of its statutory scheme, and courts must give deference to administrative interpretations of statutes); *Ross v. Denver Dep't of Health & Hosps.*, 883 P.2d 516, 519 (Colo. App. 1994) (stating that interpretation of a rule or regulation by the agency charged with its enforcement is generally entitled to great deference).

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[22] *See, e.g., City of Dallas*, 371 F. Supp. at 1029; *Western*, 658 F. Supp. at 958-59.

The issue of whether the Authority's ban is non-discriminatory also presents policy considerations properly left to the FAA. The FAA indicated in its informal letter that it currently permits multiple airports under joint ownership to allocate the operations of different classes of aircraft, but that such allocation is not permitted among airports under separate ownership. The FAA then stated:

> [Y]our letter raises a policy issue relating to how to harmonize several important goals – allowing the citizens of a region to plan and manage their aviation resources on a regional basis, while at the same time preserving and enhancing the performance of the national aviation system and ensuring that statutory and regulatory requirements associated with use of Federal grant funds are not violated. . . . We firmly support regional planning and decision-making and strongly believe that local governments should, wherever possible, plan, develop and operate their transportation systems in an integrated and regional context, *consistent with applicable Federal law*. . . .
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> [This case presents the question of] whether the Department should initiate a change to present policy to permit two or more Federally-aided airports in an area to allocate among themselves the operations of different types of classes of aircraft, through an enforceable regional planning agreement. Because *this would be a significant policy change*, full consideration by the public and the aviation community is warranted. Therefore, we will be initiating, early next year, a process to obtain a full range of views on this issue. *Currently, existing policy on airport access must be complied with.*

(Emphasis added.) By holding that the Authority is permitted to ban certain classes of service in the name of regional planning, the majority intrudes upon the FAA's authority to implement and enforce its policies as mandated by Congress.

Although the FAA's letter is not binding, we have said that courts should take particular notice of the persuasive authority provided by such guidance. *See Banner Adver., Inc. v. City of Boulder,* 868 P.2d 1077, 1083 (Colo. 1994). The FAA's letter persuades me that this case raises important policy matters that should not be resolved by this court, but rather by that agency.

The second prong of *Mashpee Tribe* is whether agency expertise is required to unravel intricate, technical facts. A determination of the policy issues presented in this case requires consideration on a regional and national level of facts not developed in this record but known to the FAA. Examples of the factual issues that must be addressed are the passenger service needs of airports located in Colorado, such as Denver International Airport and Centennial Airport, and the airports located in Broomfield, Jefferson County, Greeley, and Colorado Springs, and how these services relate to the public aviation needs on a local, regional, and national level. The third prong of *Mashpee Tribe* is whether an agency determination would materially aid the court. In my view, the state court system would benefit greatly from the expertise of the FAA in interpreting federal law, particularly on the first impression issue of proprietary powers.

Finally, I note that the FAA's informal letter to the Authority stated that the exclusion of a particular class of

service is generally arbitrary and invalid. This suggests a high probability of inconsistency between the majority's decision and the FAA's decision. "[H]armony, efficiency, and prudence" dictate deference in this case. *Mashpee Tribe*, 592 F.2d at 581 n.1.[23]

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[23] Although I would hold that we should defer to the FAA on the proprietary powers and funding issues, I possess additional reservations regarding the majority's determination that the Authority's ban is non-discriminatory.

The majority states that the Authority's ban is necessary for the safe operation of the airport because Centennial Airport lacks a terminal, security, and baggage systems. *See* maj. op. at 24. However, this argument might serve to reinforce the discriminatory nature of the ban. If safe passenger service requires such facilities, then charter flights and other unscheduled passenger services available to the more affluent would also be prohibited at Centennial Airport. I question whether the Authority's ban can be characterized as a safety regulation.

The majority states that the Authority's ban is necessary to service the civil aviation needs of the public because scheduled passenger services would create congestion, disrupting the services currently available at Centennial Airport by diverting scheduled passenger services to Denver International Airport. The district court found that the airport was approaching capacity but made no findings that Centennial Express's proposed scheduled passenger service "would disrupt" current services. *Cf. Midway*, 584 F. Supp. at 439 (extensive facts supporting the determination that the airport was congested). Under accepted federal aviation principles, it appears that a proprietor of a single airport may not circumvent the federal discrimination requirements simply because another airport in the vicinity under separate ownership is in compliance with federal anti-discrimination regulations. *See Western*, 658 F. Supp. at 957-58; FAA Order 5190.6A § 4-8(d) (Oct. 2, 1989).

IV.

I agree with the majority that local, regional, and national planning is a priority. However, I believe the Authority's ban on scheduled passenger service must be considered in the context of the public's aviation needs on the broadest possible basis by a forum designated by Congress to determine aviation policy and to decide conflicting needs among a local area, a state, and the nation. Thus, the question of whether the Authority's ban should be considered discriminatory or arbitrary is best determined by the federal agency charged with the responsibility for such policy decisions. The FAA possesses the expertise to consider the arguments advanced by the majority in light of the aviation needs of the public for the area near Centennial and to coordinate this public need with the services offered by other airports located in Colorado. Irrespective of the precipitous action by Centennial Express and the inaction of the FAA, the FAA and not the state court system is better equipped to resolve these policy matters. We should defer to the FAA regarding the scope of the proprietary powers exception and the issue concerning federal funding violations. Hence, I respectfully dissent.

I am authorized to say that Justice MARTINEZ joins in this dissent.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ARAPAHOE COUNTY PUBLIC AIRPORT AUTHORITY, a political subdivision of the State of Colorado,	)	
Petitioner,	)	No. 99-9508
v.	)	
FEDERAL AVIATION ADMINISTRATION,	)	
Respondent,	)	
CITY OF GREENWOOD VILLAGE,	)	
Intervenor,	)	
and	)	
REGIONAL AIRLINE ASSOCIATION,	)	
Amicus Curiae.	)	

ORDER

Filed May 7, 2001

Before **BRORBY**, Circuit Judge, **McWILLIAMS**, Senior Judge and **ELLISON**,* District Judge.

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* The Honorable James O. Ellison, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

Petitioner's and Intervenor's petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Steve [Illegible]
Deputy Clerk